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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANK ASTA, *et al.*,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTION PRESENTED

Whether, under the Supremacy Clause, the Occupational Safety and Health Act ("OSH Act" or "OSHA") of 1970 preempts state criminal prosecutions of employers based on conduct or conditions regulated by the Act, when the conduct and conditions in question are in compliance with the Act's standards and requirements.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following are additional petitioners:

Gerald Colby
Anthony Jordan
Kevin Keane
Allan Simon
Chicago Magnet Wire Corporation

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v.

STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Frank Asta, Gerald Colby, Anthony Jordan, Kevin Keane, Allan Simon and Chicago Magnet Wire Corporation ("petitioners") hereby petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (app. at 1-17) is reported at 534 N.E.2d 962 (1989). The opinion of the Appellate Court of Illinois, First Judicial District (app. at 18-24) is reported at 510 N.E.2d 1173 (1987). The opinion of the Circuit Court of Cook County (app. 25-31) is not reported.

JURISDICTION

The opinion of the Illinois Supreme Court was entered on February 2, 1989. On March 16, 1989, Justice Stevens extended the time for filing a petition to and in-

cluding May 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3); *see Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .

U.S. Const. art. vi, cl. 2.

Section 18(a) of the Occupational Safety and Health Act of 1970 provides:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

29 U.S.C. § 667(a).

Section 18(b) of OSHA provides:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b).

Section 4 of OSHA provides:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory

> rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4).

STATEMENT

A. The Occupational Safety and Health Act of 1970

In 1970, Congress enacted the Occupational Safety and Health Act to establish "uniformly applied occupational safety and health standards." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 1 (1970), *reprinted in Legislative History of the Occupational Safety and Health Act of 1970* ("*OSH Act Legis. Hist.*") at 141 (1971). In passing this law, Congress recognized that a solution to the problem of workplace safety required "comprehensive Federal legislation which would apply to all industries, and in a single national effort. . . ." *See* 116 Cong. Rec. 35607 (Oct. 8, 1970), *reprinted in OSH Act Legis. Hist.* at 297. Congress made the OSH Act comprehensive because it found that no one benefited from the irregular standards and enforcement practices then existing among individual states; uniformity was deemed essential for the sake of employees and employers alike.[1]

Congress understood that "the development of occupational health and safety standards involves technical and complex problems requiring professional expertise and competence." S. Rep. No. 91-1282 at 63, *reprinted in OSH Act Legis. Hist.* at 202; *see also* S. Rep. No. 91-1282

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[1] In addition to its concern for employee health and safety, Congress was concerned about the disparate treatment of employers from state to state and the competitive disadvantages imposed upon "conscientious" employers. 116 Cong. Rec. 37325 (Nov. 16, 1970), *reprinted in OSH Act Legis. Hist.* at 413. Thus, it saw a need to provide for "fair and even" enforcement. 116 Cong. Rec. 36513 (Oct. 13, 1970), *reprinted in OSH Act Legis. Hist.* at 324.

at 1-7, *reprinted in OSH Act Legis. Hist.* at 141-147. Thus, the OSH Act requires that federal "[d]evelopment of standards . . . shall be based upon research, demonstrations, experiments, and such other information as may be appropriate." 29 U.S.C. § 655(b)(5).

The standards promulgated under OSHA were intended by Congress to reflect a delicate balancing of competing interests, measured by the best available scientific evidence. The Secretary of Labor is specifically directed to take account of "other considerations"—including "feasibility" and "experience"—in addition to the "highest degree of health and safety protection" in promulgating standards. *Id.* Thus, an "occupational safety and health standard" is defined as a standard which is "*reasonably necessary or appropriate* to provide safe or healthful employment . . . ." 29 U.S.C. § 652(8) (emphasis added). Exposure standards for toxic substances are set at a level "which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer *material* impairment of health . . . ." 29 U.S.C. § 655(b)(5) (emphasis added). In fact, Congress specifically revised an earlier draft of the OSH Act "to make it perfectly clear that it does not require . . . standards that would assure an absolutely risk-free workplace." *See Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 641, 646-649 (1980) (Stevens, J.) (Noting that "the legislative history . . . supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm." *Id.* at 646.). *See* discussion, *infra* at 15.

The legislative history of the OSH Act also makes clear that Congress sought to encourage employer cooperation. Thus, Congress expressly intended that the purposes of the Act would be best achieved through "preventative rather than punitive" means. 116 Cong. Rec. 42203 (Dec. 17, 1970), *reprinted in OSH Act Legis. Hist.* at 1210. In this regard, Congress expressly considered the

inclusion of criminal penalties in the Act and decided that they would be limited.[2]

In providing for comprehensiveness and uniformity, Congress did not intend to preclude any state involvement in the field of occupational health and safety. Rather, Congress undertook to balance "the legitimate rights and interests of the States and the proper role of the Federal Government," 116 Cong. Rec. 38384 (Nov. 23, 1970), *reprinted in OSH Act Legis. Hist.* at 1025, and expressly delineated the proper state role in regulating and enforcing workplace conduct and conditions.

Section 18(a) provides that a state may assert "jurisdiction" under state law "over any occupational safety or health issue with respect to which no standard is in effect . . . ." § 18(a), codified at 29 U.S.C. § 667(a). By its terms, Section 18(a) expressly grants the states authority or jurisdiction over workplace conditions which are not regulated by the federal government under the OSH Act. Section 18(b) sets forth the state's role where OSH Act standards are in effect. It authorizes state action, but only pursuant to a federally approved state plan. To be approved, the state plan must provide for development and enforcement of health and safety standards which "are or will be at least as effective [as OSH Act standards] in providing safe and healthful employment."

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[2] Congress carefully considered and debated whether the OSH Act should contain criminal penalties for violations and, if so, the appropriate penalties. *See* 116 Cong. Rec. 37338 (Nov. 16, 1970), *reprinted in OSH Act Legis. Hist.* at 425; 116 Cong. Rec. 37625-26 (Nov. 17, 1970), *reprinted in OSH Act Legis. Hist.* at 511; S. Rep. No. 91-1765 at 41, *reprinted in OSH Act Legis. Hist.* at 1194; 116 Cong. Rec. 42203, 42205 (Dec. 17, 1970), *reprinted in OSH Act Legis. Hist.* at 1210, 1214. The final Senate bill imposed criminal penalties for wilful violations; the final House bill imposed civil penalties only. The compromise reached and embodied in the conference bill provided criminal penalties for only those wilful violations that result in death. S. Rep. No. 91-1765 at 41, *reprinted in OSH Act Legis. Hist.* at 1194.

§ 18(c)(2), codified at 29 U.S.C. § 667(c)(2). Where a proposed state standard is applicable to products distributed in interstate commerce, it will be approved only if the state can show that the state standard is "required by compelling local conditions" and does "not unduly burden interstate commerce." *Id.* Thus, states have the option of establishing equally effective standards or enforcement mechanisms only if they obtain prior federal approval to do so.[3]

Section 4, codified at 29 U.S.C. § 653(b)(4), is a "savings clause" which says nothing about state regulation, but instead addresses the effect of the OSH Act on *private* rights of action existing under state common law or statutes. Section 4 provides that nothing in the OSH Act shall affect the "workmen's compensation law" or other "common law or statutory rights, duties or liabilities of employers and employees" that might arise in connection with workplace conditions. By its terms, Section 4 "saves" only actions between *employers and employees* which arise under state law. Section 4 says nothing about state-initiated enforcement actions, whether civil or criminal in nature. Certainly, neither the statute nor its legislative history suggests that Section 4 was intended to preserve state-initiated actions where such ac-

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[3] Several states in fact have done so. For example, under Arizona's state plan, a wilful violation resulting in the death of an employee is punishable by a fine of up to $150,000 against an individual and $1,000,000 against a corporation and imprisonment for up to one and one-half years. Ariz. Rev. Stat. Ann. § 23-418. Under Puerto Rico's plan, a wilful violation causing death may result in imprisonment for up to three and one-half years for the first violation, and up to four and one-half years for a second violation. P.R. Laws Ann. tit. 29, ch. 16 § 361x. North Carolina's state plan expressly provides for the application of state general criminal laws for wilful violations that result in death. N.C. Gen. Stat. § 95-139. Illinois, however, does not have a state plan in effect. A plan was submitted by the State and approved in November 1973, but was withdrawn by the State in June 1975.

tions otherwise would be expressly preempted under Section 18(b).

B. Proceedings in the Lower Courts

Petitioners are five individual officers and agents of Chicago Magnet Wire Corporation ("CMW") and the corporation itself. CMW is an Illinois-based manufacturer of coated wire. During the relevant period, Anthony Jordan was the president of CMW, Kevin Keane was the plant manager, Frank Asta was the maintenance foreman, Allan Simon was the plant engineer and Gerald Colby served in several supervisory positions in the areas of engineering, maintenance and quality control. Petitioners were indicted under the Illinois penal code in June, 1985 by a Cook County, Illinois grand jury. Each petitioner was charged with multiple counts of aggravated battery and reckless conduct under Ill. Rev. Stat. ch. 38, §§ 12-4(a), (c) and 12-5. (App. at 32-34.) The individual petitioners also were charged with conspiracy to commit aggravated battery under Ill. Rev. Stat., ch. 38, § 8-2(a). (App. at 31-32.) [4]

The indictments alleged that certain CMW employees sustained injuries due to (1) exposure of the employees to OSHA-regulated substances, (2) failure to provide necessary safety equipment and health monitoring systems, and (3) maintenance of dangerous working conditions. According to the indictments, which read like an OSHA notice of violation, the acts of the defendants constituted a violation of the defendants' "duty to provide . . . safe" workplaces for their employees. The indictments strikingly fail to allege that the defendants had violated OSH Act regulations. In fact, the State has

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[4] The individual petitioners each were charged with 52 counts of aggravated battery, 41 counts of reckless conduct and one count of conspiracy. If convicted, they face up to 10-20 years imprisonment and $571,000 in fines. *See* app. at 31, 33, 34; Ill. Rev. Stat., ch. 38, ¶¶ 1005-8-1, 1005-8-3, 1005-8-4, 1005-9-1.

never contested petitioners' claim that the conduct and conditions at issue were in full compliance with OSH Act regulations and standards. Instead, the State has argued that compliance with OSH Act regulations and standards is irrelevant in the context of a state criminal prosecution.

Petitioners moved in the Circuit Court of Cook County to dismiss the indictments for failure to state an offense on the ground that, under the Supremacy Clause, the OSH Act preempted this state prosecution because all of the conduct and conditions in question were regulated by the Act and because petitioners were in compliance with those regulations.[5] On December 13, 1985, the court granted the motion and dismissed the indictments. The court held that the OSH Act preempted the state prosecutions based upon the conduct at issue which, the court found, was pervasively regulated under the OSH Act. App. at 29-30.

The Appellate Court of Illinois affirmed. It relied primarily upon the comprehensive nature of the OSH Act and the fact that it provides states the opportunity to develop and enforce their own occupational safety and health schemes if they obtain federal approval in advance. Based upon the legislative history of the Act, the court concluded that Congress intended the imposition of criminal sanctions for OSH Act-regulated activities only in "highly limited circumstances." App. at 24. Congress provided that "health and safety requirements should be established through standard-setting" and administrative enforcement "which provides employers with clear and detailed notice of their legal obligations." *Id.* The im-

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[5] Petitioners argued, in the alternative, that the indictments should be dismissed because they violated defendants' rights under the Due Process Clause of the United States Constitution. This claim was not decided by any of the courts below and is not now before this Court.

position of criminal liability regardless of compliance with OSH Act standards "would lead to piecemeal and inconsistent prosecutions of regulatory violations," which Congress sought to avoid. *Id.* The court observed that application of state criminal laws would not be foreclosed "if the prosecutions charged the defendants with crimes not involving working conditions." App. at 23. But this case is different, the court reasoned, because "[t]he conduct the State seeks to regulate here, . . . as evidenced by the language of the indictments, is conduct related to working conditions now regulated by OSHA." *Id.*

The Illinois Supreme Court reversed. The court distinguished state "police power"—which it held that Congress, in enacting OSHA, did not intend to preempt—from an exercise of regulatory authority over workplace conditions, which Congress did intend to preempt. App. at 8-10. The court rejected petitioners' argument that the imposition of criminal penalties in this context was intended to, and did, operate as a form of "regulatory" control, *i.e.*, criminal sanctions would deter undesirable conduct and coerce compliance with standards acceptable to the state. App. at 6-8. Instead, the court held that imposition of criminal sanctions was analogous to imposition of punitive damages in torts. App. at 10. According to the court, Congress, in saving tort remedies from preemption in Section 4, also intended to "save" state criminal penalties.

The court then considered whether such state criminal prosecutions conflict with the regulatory structure of the OSH Act, and concluded that they do not. To the contrary, the court held that such prosecutions further the goal of protecting workers by providing additional sanctions for harmful workplace conditions and ensuring that responsible persons receive "appropriate punishment." App. at 15. The court acknowledged that Congress had "invited" state participation in health and safety regu-

lation through federally approved plans, but held that this merely "demonstrates that [Congress] did not intend to preclude supplementary State regulation." App. at 9. Accordingly, the court dismissed petitioners' constitutional defense based on the Supremacy Clause and therefore remanded the matter for prosecution.

REASONS FOR GRANTING THE PETITION

The decision of the Illinois Supreme Court exposes five individual employees and a corporation to criminal prosecutions potentially involving years of imprisonment and significant fines based on workplace conditions which have been comprehensively regulated by the federal government and were never alleged to have been in violation of any federal standard. Thus, it raises an important and recurring question of the scope of preemption under the Occupational Safety and Health Act of 1970. The analysis by the court below represents a serious misapplication of this Court's preemption holdings and conflicts with a number of other state court decisions which have held that no criminal prosecution is appropriate in the circumstances of this case. Finally, the decision below eliminates the uniformity of health and safety standards in the workplace that Congress believed to be vital to ensuring stable employment relations.

At bottom, the question whether an employer and managing employees can be exposed to criminal prosecutions by state authorities for conduct regulated by the OSH Act is one this Court eventually will have to decide. That issue is cleanly and squarely presented by the indictments in this case, which the Illinois Supreme Court has now held to be valid, regardless of the existence of, or compliance with, federal standards under the OSH Act. Because individuals should not be subject to potential criminal sanctions or the ordeal of a trial for conduct which Congress has removed from the reach of state criminal prosecutions—and because those individuals' susceptibility

to prosecution should not depend on the particular state in which they happen to live and work—the Court should grant the petition and resolve this important issue of federal law on which state courts have divided.

A.

1. Federal preemption of state law under the Supremacy Clause turns on congressional intent. Under the preemption doctrine, preemption is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982).[6] Where Congress intends a matter to be controlled exclusively by federal law, it is said to "preempt the field." In that situation, "any state law falling within that field is preempted," even if the state law complements federal statutory purposes or standards. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). *See also Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 155-156 (1942).[7]

In addition, preemption is required whenever state law actually conflicts with federal law. *See Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153; *Florida Lime &*

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[6] Thus, a finding of preemption may be based on the express language of the statute, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 528-32 (1977), or implied from a reading of the statute as a whole, including its structure and legislative history, *see Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 386-387 (1983).

[7] Such preemption is implied where the scheme of federal regulation is so "pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where "the object sought to be obtained by the federal law and the character of obligations imposed by it" reveal the intent to displace state law. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153, citing *Rice*, 331 U.S. at 230.

Avocado Growers, Inc. v. *Paul*, 373 U.S. 132, 142-143 (1963). Conflict will be found where federal law and state law impose inconsistent duties making compliance with both impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1940). *See also Michigan Canners and Freezers Ass'n, Inc.* v. *Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1984); *Jones*, 430 U.S. at 526, 540-541.[8]

Preemption does not, as the court below suggested, turn on the type of state law involved. *See Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 197 (1978). State laws of general applicability, criminal laws and administrative regulations all are subject to the dictates of the Supremacy Clause. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The "critical inquiry" is not whether the state law is a "regulatory" provision or a "general" criminal or tort law, but instead, whether the state law is brought to bear on conduct regulated under the preemptive umbrella of federal law. *Sears, Roebuck & Co.*, 436 U.S. at 197, 199. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Amalgamated Ass'n*

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[8] "The test of whether both federal and state regulations may operate . . . is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142. Conflict in "technique" is considered as disruptive as conflict in "overt policy." *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 287 (1971). In addition, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . . ." *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153.

of Street, Electric Railway & Motor Coach Employees v. *Lockridge*, 403 U.S. 274, 292 (1971).

2. The decision of the Illinois Supreme Court is inconsistent with these basic principles of preemption doctrine as enunciated by this Court. Instead of carefully examining the language, structure and history of the OSH Act, the court simply engaged in an irrelevant analysis of the distinctions between state criminal laws and "regulatory" laws governing workplace conditions and the similarities between private tort actions and state criminal prosecutions. Thus, the court below has held that, in Illinois at least, traditional preemption doctrine does not apply to "general" criminal laws. But this Court consistently has rejected any such suggestion. *See, e.g., Sears, Roebuck & Co.*, 436 U.S. at 191-93; *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142; *see also Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153. If the court below had properly analyzed the problem, it would have concluded that, preemption is appropriate in this case (1) under the express terms of the statute, (2) as a matter of "preemption of the field" and (3) because of the conflict between federal and state standards.

First, examination of the statutory language demonstrates that this prosecution is expressly preempted by OSHA.[9] Sections 4 and 18 of the statute delineate the

[9] This Court's decisions regarding the preemptive effect of the Employee Retirement Income Security Act of 1974 ("ERISA") offer guidance in this regard. Like the OSH Act, ERISA contains express preemptive language and a savings clause. Also like the OSH Act, ERISA was intended to establish a "comprehensive legislative scheme," which "represents a careful balancing" and "policy choices," *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987), and was enacted to eliminate the "threat of conflicting or inconsistent State and local regulation . . . ." *Id.* at 46. *See also Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987). Based on this intent, this Court has consistently construed ERISA's preemption clause broadly, giving effect to its "plain language." *Shaw*

proper role of state law with respect to OSHA-regulated conduct or conditions. Section 4 is the "savings clause" of the OSH Act. It provides that:

> Nothing in [OSHA] shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish . . . common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death . . . in the course of, employment.

29 U.S.C. § 653(b)(4). Under the plain meaning of the statute, Section 4 clearly is designed to preserve state workmen's compensation and other *private* civil tort (or contractual) actions. Although it makes clear that Congress did not intend the Act to have *any* effect on the "rights, duties or liabilities of *employers and employees*," the provision says nothing about actions undertaken by the state itself.

Section 18 addresses the preemptive effect of the Act on state-initiated actions. On an "issue with respect to which a Federal standard has been promulgated," which is this case, a state may only "assume responsibility for development and enforcement" of standards relating to such issues if a federally-approved state plan is in place. 29 U.S.C. § 667(b). Thus, the plain meaning of the OSH Act makes clear that Congress intended to preclude any state-initiated action regarding workplace safety—including "general" criminal prosecutions—unless undertaken pursuant to an approved state plan. No such plan exists and, therefore, under the express terms of Section

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v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). *See also Pilot Life Insurance*, 481 U.S. at 46-47. Its savings clause, in contrast, has been construed narrowly, *id.* at 52; *Shaw*, 463 U.S. at 104, to save only those actions expressly enumerated. Following that approach in this case leads inexorably to the conclusion that the criminal prosecution is preempted by Section 18.

18 the enforcement action brought in the State of Illinois is preempted.

Second, even absent express preemption, OSHA is a paradigm of a federal effort to "preempt the field." The statute and its legislative history repeatedly reinforce the idea that *when there are federal standards in place*, those standards are intended to be the uniform and comprehensive standards (in the absence of an approved state plan). *See* 29 U.S.C. §§ 667(a) & (b); S. Rep. No. 91-1282 at 1-7, *reprinted in OSH Act Legis. Hist.* at 141-147. It is no answer to say, as the State does in this case, that Congress intended to preempt only the "field" of occupational safety and health "regulation" and not the "field" of "general criminal law." Here, the criminal charge is based upon breach of a "duty" to provide a safe workplace, *i.e.*, exposing employees to certain conditions or substances which are regulated by the OSH Act. Where, as here, OSHA has taken it upon itself to define the employers' duties, there can be no question that the state is operating within the "field" of exclusive regulation—regardless of what category or label the state uses to define its legal action. As the Appellate Court of Illinois correctly observed, the dispositive fact is that "[t]he conduct the State seeks to regulate here, . . . as evidenced by the language of the indictments, is conduct related to working conditions now regulated by OSHA." App. at 23.[10]

Finally, the Illinois Supreme Court's conclusion that no conflict exists between the criminal prosecution and

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[10] Thus, this case is dissimilar from *Massachusetts* v. *Morash*, 57 U.S.L.W. 4429 (1989), where this Court found that the conduct at issue was not conduct regulated under ERISA. The case also is readily distinguishable from *California* v. *ARC America Corp.*, where the court specifically found that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies" and where there was no conflict in the application of both state and federal remedial provisions to the same conduct. 57 U.S.L.W. 4425, 4427, 4428 (1989).

federal workplace regulation under the OSH Act is fatally flawed because it is not based on a consideration of the "full purposes and objectives" of the OSH Act and the potential effects of a state criminal prosecution in the area. The Illinois court's reliance on the OSH Act's "stated goal" "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. § 651(b), is certainly accurate—as far as it goes. The problem is that the court below focused on that stated purpose to the exclusion of all of the other specific, substantive provisions of the Act. Congress did not stop with a simple assertion that its goal was to assure safe working conditions. It specifically provided that states were to exercise jurisdiction in only two circumstances: (1) where "no [federal] standard is in effect", and (2) where, under a federally-approved plan, the state has adopted standards at least as effective as promulgated under the OSH Act.

State prosecutions based on workplace conditions conflict with the federal law because the OSH Act mandates *uniform* development and enforcement of fair and *balanced* occupational safety and health standards, which are established pursuant to scientific standards and procedural protections. *Ad hoc* state prosecutions for conduct regulated by the OSH Act, such as the one endorsed by the court below, have resulted and will continue to result in the enforcement of *different* standards of occupational health and safety. Regardless of whether such *ad hoc* state standards are more "strict" or more "lenient," application of a different standard to conduct and conditions in compliance with OSHA standards conflicts with Congress' objective of creating uniform and balanced workplace safety standards.[11] *See supra* at 3-4.

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[11] The court below brushed aside the conflict created when the state enforces more stringent standards than OSHA's by stating that OSH Act standards were intended merely to establish a "na-

3. If the preemption ruling of the Illinois Supreme Court is left in place, the development of occupational health and safety standards in the manner Congress intended and provided for in the OSH Act will be severely undermined. Instead of experienced and knowledgeable federal officials setting uniform national workplace safety standards based on available scientific evidence, *see supra* at 4, an entire "secondary" level of "workplace standards" will be established by local prosecutors and juries, wholly uninformed (and, most likely, wholly unconcerned) with the economic and scientific complexities of workplace safety. Such local authorities will simply decide, without guidance, whether to deem a particular workplace environment "safe"—regardless of what standards the federal government, under OSHA, has established to regulate that environment.

Of course, these local "standards" will be established on a subjective and post-hoc basis, rather than on the basis of objective scientific criteria, as required under § 655(b)(5), thereby negating congressional efforts to ensure that employers and employees know what their rights and duties are. *See supra* at 3. This relegation of federal standards to a subordinate role could not be more clearly illustrated than by the State's successful contention that OSHA standards simply are irrelevant in this case.

In sum, the decision below invites localized and politicized decisionmaking on workplace standards, the very

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tionwide floor", app. at 10-11, and that state standards "more protective" of health and safety will further the OSH Act's "stated goal" of worker protection, app. at 14-15. That simply is an erroneous reading both of preemption principles, in general, and the OSH Act, in particular. As stated in the text, the OSH Act is a statute that deals not just with general workplace safety objectives, but specifically limits state authority to instances where no federal standard is in effect or where the state has adopted a federally-approved plan for enforcing workplace health and safety.

conditions that the OSH Act was designed to correct. Senator Saxbe may have described those conditions best:

> In some States it was political football. When the administration would change, inspectors would change. They were not always career people who were qualified. Many times they were local politicians who were offered a job without any real training in health and safety.

116 Cong. Rec. 36521 (Oct. 13, 1970), *reprinted in OSH Act Legis. Hist.* at 343. Under the decision below, local prosecutors will have discretion to use imprecise judgment as to workplace safety to indict an employer or even, in extreme cases, for purposes of political harassment. Moreover, it seems plain that Congress' intent to encourage employer cooperation will be thwarted if employers (such as petitioners) who comply with OSH Act standards become subject to local prosecution.

B.

Although prosecutions such as this one are a relatively recent phenomenon, this is by no means an isolated case.[12] This case is simply one of a substantial number in which local prosecutors have attempted to use state criminal prosecutions in an effort to "regulate" conduct or conditions otherwise exclusively regulated under the OSH Act. Not only does the sheer volume of reported cases indicate that the decision below involves an issue of federal law that is recurring and important, but the decisions in various jurisdictions have been inconsistent.

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[12] The first state conviction of a corporate officer for a workplace death occurred in Cook County, Illinois in 1985 in the case of *People* v. *O'Neil*, Nos. 83-11091, 84-5064 (Cook County Cir. Ct. June 15, 1985), *appeal pending*, App. Ct. Ill., Nos. 85-1853, 85-1854, 85-1855, 85-1952 and 85-1953, in connection with the death of an employee from cynanide fumes. *See The National Law Journal*, April 21, 1986, at 1, col. 1. The preemption question was not raised at trial, but was raised on appeal.

Thus, the fate of individual criminal defendants, such as petitioners, has depended on their place of residence or employment. Such a situation clearly warrants review by this Court.

At present, the holding below conflicts with decisions of courts in several states that have held that the OSH Act preempts prosecutions based on workplace conditions. In addition, the holding below conflicts with the Montana Supreme Court's interpretation of the preemptive effect of the OSH Act.[13]

In *People* v. *Hegedus*, 169 Mich. App. 62, 425 N.W.2d 729 (1988), a supervisor was charged with involuntary manslaughter in connection with the death of an employee from carbon monoxide intoxication. The Michigan Court of Appeals held that the OSH Act preempted the prosecution on the ground that it "expressly provides for the adoption of federal standards of industrial safety. Although the states are permitted to exercise independent state action under certain circumstances, such jurisdiction is severely limited" to situations where there is no federal standard in effect or where there is a federally-approved state plan in effect. 425 N.W.2d at 732. The court noted that Michigan had such a plan but the prosecutions were not brought pursuant to it. Thus, the court held that the state was trying to circumvent the OSH Act and the penalties provided for under the Michigan plan, in direct conflict with § 667 "which specifically addresses a state's 'jurisdiction' with regard to occupational safety and health issues." *Id.* at 732. The Michigan Supreme Court has granted leave to appeal with respect to the limited issue of whether the OSH Act preempts the prosecution. 429 N.W.2d 593 (Mich. 1988).

[13] The Wisconsin Court of Appeals, like the Illinois Supreme Court, decided against preemption in *State* v. *Black*, 144 Wis.2d 745, 425 N.W.2d 21 (Wis. App. 1988), in which an officer and operator of a fireworks plant was convicted of homicide by reckless conduct following a fire and explosion that killed an employee.

In *Sabine Consolidated, Inc.* v. *Texas*, 756 S.W.2d 865 (Tex. Ct. App. 1988), a Texas construction company and its president were convicted of criminally negligent homicide in connection with the death of two employees when a trench they were working in collapsed. The Texas Court of Appeals reversed on the ground that the OSH Act preempted the prosecution. The court relied on Sections 667 and 653(b)(4) to hold that the OSH Act preempts the entire field of workplace safety regulation. It specifically found that Section 653(b)(4) does not "save" state criminal actions from preemption. *Id.* at 868. The court noted that while state criminal prosecutions "do not literally purport to establish worker safety standards . . . the practical effect" is to do so. *Id.* It expressed its concern that if a state were allowed to undertake such prosecutions, "an employer could meet OSHA standards but still be prosecuted by the State a result [which would be] inconsistent with OSHA's intent to establish uniform safety standards." *Id.* at 869.

In *Colorado* v. *Kelran Construction, Inc.*, 13 OSHC 1898 (Dist. Ct. Colo. Oct. 6, 1988), the defendant corporation was charged with criminally negligent homicide and the court dismissed the indictment on the ground that "Congress has expressly disallowed regulations other than OSHA's or those of a state properly approved by OSHA." *Id.* at 1899-1900. It found that application of general criminal laws in an OSH Act context constituted such prohibited regulation, stating that "[t]he Court cannot find that Congress intended [that] employers were required to meet the federal OSHA and OSHA approved state standards PLUS other standards imposed by local prosecutors, courts, and juries." *Id.* at 1899.[14]

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[14] Similarly, in *New York* v. *Pymm Thermometer Corp.*, No. 93086 (N.Y. Sup. Ct. Nov. 13, 1987), *appeal pending*, N.Y. App. Div., a New York thermometer manufacturer and its owners were found guilty by a jury of criminal assault and reckless endangerment for allowing workers to be exposed to what the jury believed

Finally, in *Thornock* v. *State*, 745 P.2d 324 (Mont. 1987), an employee injured by a sawmill conveyer brought a negligence action against the State of Montana based upon a state statutory duty to inspect hazardous workplaces and machinery. The Montana Supreme Court affirmed a grant of summary judgment against the employee on the ground that the OSH Act preempted the action. The court rejected the employee's argument that "OSHA was intended to preempt states from setting and enforcing their own standards as to worker safety but not as to inspections," *id.* at 326, on the ground that inspection is "part and parcel of the enforcement of standards" which "Congress has stated expressly that formulation and enforcement of work place safety will be a prerogative of OSHA," *id.* at 328. The court observed that "[i]t is plain from reading the Occupational Safety and Health Act that Congress intended to occupy the field of assuring worker safety" and noted that "to regain the right to set and enforce work safety rules" the state must enact and obtain federal approval of a state plan. *Id.*

Thus, the issue of OSH Act preemption is a recurring one which ultimately will have to be resolved by this Court. The number of criminal prosecutions in recent years compared to prior years demonstrates a marked trend toward greater use of state criminal laws to enforce workplace standards, which will only continue if left unchecked. Moreover, the stakes are high. Employers are subject to criminal prosecution for conduct and conditions which may, as in this case, comply with federal standards. State courts so far have been unable to resolve the issue in any consistent manner. Thus, employers and employees alike are provided no guidance as to their respective rights and responsibilities.

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to be unsafe levels of mercury fumes. However, following the entry of the jury verdict, the trial judge set aside the verdict on grounds of OSH Act preemption.

In the meantime, the integrity of the OSH Act is being eroded. State and local prosecutors are implementing and enforcing state "standards" without obtaining federal approval of a state plan, in direct contravention of Congress' intent. The confidence of employers and employees in the significance and effectiveness of OSH Act standards is undermined, especially in the case of prosecutions for conduct which complies with those federal standards. And the ability of the OSH Act's administrators to fulfill Congress' objective of uniform, predictable and effective national workplace safety standards is seriously compromised. Accordingly, this case presents precisely the type of issue that historically was subject to the mandatory jurisdiction of the Court, and that should be accepted for discretionary review now because of its fundamental importance, which transcends the specific facts of the case before the Court.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Illinois should be granted.

Respectfully submitted,

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May 3, 1989

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF ILLINOIS

Docket No. 65588—Agenda 12—March 1988.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

CHICAGO MAGNET WIRE CORPORATION *et al.*,
Appellees.

JUSTICE WARD delivered the opinion of the court:

The issue we consider on this appeal is whether the Occupational Safety and Health Act of 1970 (OSHA) (29 U.S.C. § 651 *et seq.* (1982)) preempts the State from prosecuting the defendants, in the absence of approval from OSHA officials, for conduct which is regulated by OSHA occupational health and safety standards.

Indictments returned in the circuit court of Cook County charged the defendants, Chicago Magnet Wire Corporation, and five of its officers and agents, Anthony Jordan, Kevin Keane, Frank Asta, Gerald Colby and Allan Simon, with aggravated battery (Ill. Rev. Stat. 1985, ch. 38, pars. 12-4(a), (c)) and reckless conduct (Ill. Rev. Stat. 1985, ch. 38, par. 12-5). The individual defendants were also charged with conspiracy to commit aggravated battery (Ill. Rev. Stat. 1985, ch. 38, par. 8-2(a)). In substance, the indictments alleged that the defendants knowingly and recklessly caused the injury of 42 employees by failing to provide for them necessary safety precautions in the workplace to avoid harmful

exposure to "poisonous and stupifying substances" used by the company in its manufacturing processes. On the defendants' motion, the trial court dismissed the charges, holding that OSHA has preempted the State from prosecuting the defendants for the conduct alleged in the indictments. The appellate court affirmed (157 Ill. App. 3d 797), and we granted the State's petition for leave to appeal under Supreme Court Rule 315 (107 Ill. 2d R. 315(a)).

Defendant Chicago Magnet Wire Corporation is an Illinois corporation whose principal business is the coating of wire with various substances and chemical compounds. Anthony Jordan, Kevin Keane, Allan Simon, Frank Asta and Gerald Colby are officers or managerial agents of the corporation.

The indictments charged that the defendants unreasonably exposed 42 employees to "poisonous and stupifying substances" in the workplace and prevented the employees from protecting themselves by "failing to provide necessary safety instructions and necessary safety equipment and sundry health monitoring systems." The indictments also alleged that the defendants improperly stored the substances, provided inadequate ventilation and maintained dangerously overheated working conditions.

Counts of the indictments charging the defendants with aggravated battery alleged that the defendants exposed the employees to the toxic substances with "the conscious awareness that a substantial probability existed that their acts would cause great bodily harm" in violation of section 12-4(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1985, ch. 38, par. 12-4(a)). Other counts charging the defendants with aggravated battery alleged that the defendants knowingly committed acts "with the awareness that a substantial probability existed" that their conduct would cause the employees to "take by deception [of the employer], for other than medical pur-

poses, poisonous and stupifying substances" in violation of section 12-4(c) (Ill. Rev. Stat. 1985, ch. 38, par. 12-4(c)). The defendants were charged with reckless conduct in that they exposed the employees to substances "in a reckless manner, which caused harm to and endangered * * * [their] bodily safety * * * by consciously disregarding a substantial and unjustifiable risk of harm * * * which constitute[s] a gross deviation from the standard of care which a reasonable person would exercise in this situation." (Ill. Rev. Stat. 1985, ch. 38, par. 12-5.) The conspiracy counts alleged that the individual defendants conspired with the intent to commit aggravated battery and charged that in furtherance of the conspiracy, the defendants committed certain overt acts. Ill. Rev. Stat. 1985, ch. 38, par. 8-2(a).

The circuit court dismissed the indictments, holding that OSHA preempts the States from prosecuting employers for conduct which is governed by Federal occupational health and safety standards, unless the State has received approval from OSHA officials to administer its own occupational safety and health plan. The court stated that because the conduct of the defendants set out in the indictments was governed by OSHA occupational health and safety standards, and the State had not received approval from OSHA officials to administer its own plan, it could not prosecute the defendants for such conduct.

The extent to which State law is preempted by Federal legislation under the supremacy clause of the Constitution of the United States is essentially a question of congressional intendment. (See *Malone v. White Motor Corp.* (1978), 435 U.S. 497, 504, 55 L. Ed. 2d 443, 450, 98 S. Ct. 1185, 1190; *Retail Clerks International Association, Local 1625 v. Schermerhorn* (1963), 375 U.S. 96, 11 L. Ed. 2d 179, 84 S. Ct. 219.) Thus, if Congress, when acting within constitutional limits, explicitly mandates the preemption of State law within a stated situa-

tion, we need not proceed beyond the statutory language to determine that State law is preempted. (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n* (1983), 461 U.S. 190, 203, 75 L. Ed. 2d 752, 765, 103 S. Ct. 1713, 1722.) Even absent an express command by Congress to preempt State law in a particular area, preemptive intent may be inferred where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation" (*Hillsborough County v. Automated Medical Laboratories, Inc.* (1985), 471 U.S. 707, 713, 85 L. Ed. 2d 714, 721, 105 S. Ct. 2371, 2375; *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152), or where the regulated field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" (*Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152; *Hines v. Davidowitz* (1941), 312 U.S. 52, 85 L. Ed. 581, 61 S. Ct. 399). Congressional intent to preempt State law may also be inferred where " 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " *Fidelity Federal Savings & Loan Association v. de la Cuesta* (1982), 458 U.S. 141, 153, 73 L. Ed. 2d 664, 675, 102 S. Ct. 3014, 3022, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152.

The declared purpose of OSHA is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." (29 U.S.C. § 651(b) (1982).) To this end, Congress gave the Secretary of Labor the authority "to set mandatory occupational safety and health standards" for the workplace and to secure compliance with those standards by imposing civil and crim-

inal sanctions for their violation. (See 29 U.S.C. § 651 (b)(3) (1982).) An "occupational health and safety standard" is defined as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." (29 U.S.C. § 652 (8) (1982).) OSHA also imposes a duty on employers, separate and independent from specific standards set by the Secretary, to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a) (1982).

Congress also authorized the Secretary to conduct investigations and on-site inspections of workplaces and to institute enforcement proceedings for violations of OSHA standards. (See 29 U.S.C. §§ 657 through 659, 662 (1982).) For violations of specific OSHA standards or section 654(a), OSHA authorizes the imposition of civil fines ranging from $1,000 to $10,000 (29 U.S.C. §§ 666(a) through (c) (1982)). Criminal fines of $10,000 may be imposed for giving unauthorized advanced notification of an OSHA inspection or knowingly making false statements on any OSHA filing. (See 29 U.S.C. §§ 666(e), (f) (1982).) OSHA also provides for prison terms of up to six months for willful violations of OSHA standards that result in an employee's death. 29 U.S.C. § 666(e) 1982).

The defendants read section 18(a) of OSHA (29 U.S.C. § 667(a) (1982)) to mean that under it Congress explicitly provided that the States are preempted from asserting jurisdiction over any occupational health and safety issue that is governed by OSHA occupational health and safety standards unless the State obtains approval from OSHA officials to administer its own occupational health and safety plan under section 18(b). Section 18 provides:

> "(a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement." 29 U.S.C. § 667 (1982).

The defendants state that the conduct alleged in the indictments is governed by OSHA occupational health and safety standards. Specifically, they claim that OSHA standards define permissible exposure limits for the toxic substances which allegedly injured their employees and that OSHA also regulates the conduct that the prosecution says rendered the company's workplace unsafe. The defendants contend that therefore the trial court correctly held that, because the State had not received approval from OSHA officials pursuant to section 18(b) to prosecute the conduct set out in the indictments, the charges must be dismissed. We disagree.

Contrary to this argument, we cannot say that the language of section 18 of OSHA can reasonably be construed as explicitly preempting the enforcement of the criminal law of the States as to conduct governed by OSHA occupational health and safety standards. The language of section 18 refers only to a State's development and enforcement of "occupational health and safety standards." (29 U.S.C. § 667(a) (1982).) Nowhere in section 18 is there a statement or suggestion that the enforcement of State criminal law as to federally regulated workplace matters is preempted unless approval is obtained from OSHA officials.

The defendants argue, however, that because the charges set out in the indictments are based on conduct related to an alleged failure to maintain a safe work environment for their employees, in practical effect, the State is attempting to enforce occupational health and safety standards. They contend that the primary purpose of punishing conduct under criminal law is to deter conduct that society deems harmful and to secure conformity with acceptable norms of behavior. In that way, the criminal law establishes standards of care in society. When applied to conduct in the workplace, the defendants argue, criminal law serves the same purpose as OSHA, *i.e.*, to compel adherence to a particular standard of safety that will minimize the risk of injury.

It is the defendants' contention that in enacting OSHA, Congress intended to preempt all State laws to the extent they regulate workplace safety. They cite regulations promulgated by the Secretary which they say so interpret OSHA. Specifically, they note that section 1901.2 provides:

> "Section 18(a) of [OSHA] is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue to which a Federal standard has been issued." 29 C.F.R. § 1901.2 (1986).

They cite too this regulation promulgated by the Secretary:

> "[OSHA's preemption provisions] apply to all state or local laws which relate to an issue covered by a Federal standard, without regard to whether the state law appears to be 'at least as effective as' the Federal standard." Hazard Communication Standard, 52 Fed. Reg. 31,852, 31,860 (1987).

We cannot accept the defendants' contention that it must be concluded that Congress intended to preempt the enforcement of State criminal laws in regard to conduct of employers in the workplace because the State criminal

laws implicitly enforce occupational health and safety standards.

Although the imposition of sanctions under State penal law may effect a regulation of behavior as OSHA safety standards do, regulation through deterrence, however, is not the sole purpose of criminal law. For example, it also serves to punish as a matter of retributive justice. Too, whereas OSHA standards apply only to specific hazards in the workplace, criminal law reaches to regulate conduct in society in general. In contrast, occupational health and safety standards are promulgated under OSHA primarily as a means of regulating conduct to prevent injuries in the workplace.

It is to be observed also that for the most part OSHA imposes strict liability for violation of its standards, and that the criminal charges here allege that the defendants knowingly or recklessly injured several of their employees by unreasonably exposing them to toxic substances in the workplace. In order to be convicted of the charges, the State must establish that the defendants not only committed acts causing injury but that they also had the charged mental state, *i.e.*, that they recognized the risk of injury and nevertheless wilfully failed to take precautions to prevent injury. Thus, the criminal charges here do not set any new or other standards for workplace safety but rather seek to impose an additional sanction for an employer's conduct that, if proved, would certainly violate the duty set out in section 654(a) of OSHA (29 U.S.C. § 654(a) (1982)).

There is nothing in the structure of OSHA or its legislative history which indicates that Congress intended to preempt the enforcement of State criminal law prohibiting conduct of employers that is also governed by OSHA safety standards. We would observe that the Supreme Court declared in *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 525, 51 L. Ed. 2d 604, 614, 97 S. Ct. 1305, 1309, that "[w]here * * * the field which Congress is said

to have pre-empted has been traditionally occupied by the States, * * * 'we start with the assumption that the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" See also *Hillsborough County v. Automated Medical Laboratories, Inc.* (1985), 471 U.S. 707, 715, 85 L. Ed. 2d 714, 722-23, 105 S. Ct. 2371, 2376; *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236, 244, 3 L. Ed. 2d 775, 782, 79 S. Ct. 773, 779.

Certainly, the power to prosecute criminal conduct has traditionally been regarded as properly within the scope of State superintendence. (See *Knapp v. Schweitzer* (1985), 357 U.S. 371, 375, 2 L. Ed. 2d 1393, 1398, 78 S. Ct. 1302, 1305; *Patterson v. New York* (1977), 432 U.S. 197, 201, 53 L. Ed. 2d 281, 287, 97 S. Ct. 2319, 2322. The regulation of health and safety has also been considered as "primarily, and historically" a matter of local concern. (See *Hillsborough County v. Automated Medical Laboratories, Inc.* (1985), 471 U.S. 707, 719, 85 L. Ed. 2d 714, 725, 105 S. Ct. 2371, 2378.) It cannot be said that it was the "clear and manifest" purpose of Congress to preempt the application of State criminal laws for culpable conduct of employers simply because the same conduct is also governed by OSHA occupational health and safety standards.

Although the provisions of OSHA are comprehensive, that Congress, in section 18, invited the States to administer their own occupational health and safety plans demonstrates that it did not intend to preclude supplementary State regulation. Indeed, section 651 of OSHA (29 U.S.C. § 651 (1982)) provides that the States are "to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws." It seems clear that the Federal interest in occupational health and safety was not to be exclusive.

Too, considering that until the recently increased interest in environmental safety charges were rarely

brought under State law for conduct relating to an employer's failure to maintain a safe workplace, it would be unreasonable to say that Congress considered the preemption of State criminal law when enacting OSHA. (See *Pratico v. Portland Terminal Co.* (1st Cir. 1985), 783 F.2d 255, 266 ("Our review of the legislative history of OSHA suggests that it is highly unlikely that Congress considered the interaction of OSHA regulations with other common law and stautory schemes other than worker's compensation").) Indeed, OSHA provides principally civil sanctions and only a few minor criminal sanctions for violations of its standards. Even for wilful violations of OSHA standards which result in an employee's death an employer can be sentenced only to a maximum of six months' imprisonment. There is no penalty provided for conduct which causes serious injury to workers. It seems clear that providing for appropriate criminal sanctions in cases of egregious conduct causing serious or fatal injuries to employees was not considered. Under these circumstances, it is totally unreasonable to conclude that Congress intended that OSHA's penalties would be the only sanctions available for wrongful conduct which threatens or results in serious physical injury or death to workers.

We judge that the purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards. (See *United Airlines, Inc. v. Occupational Safety & Health Appeals Board* (1982), 32 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387.) It was not fear that the States would apply more stringent standards or penalties than OSHA that concerned Congress but that the States would apply lesser ones which would not provide the necessary level of safety. The comment has been made: "Congress * * * sought uniform national standards not to facilitate commerce but to prevent the 'race for the bottom' that occurred when each state sets its own standards. Congress favored a federal

law 'so that those states providing vigorous protection would not be disadvantaged by those that did not.'" (See Note, *Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535, 550 (1987).) While additional sanctions imposed through State criminal law enforcement for conduct also governed by OSHA safety standards may incidentally serve as a regulation for workplace safety, there is nothing in OSHA or its legislative history to indicate that Congress intended to preempt the enforcement of State criminal law simply because of its incidental regulatory effect.

A question with resemblance to the one here was before the Supreme Court in *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 78 L. Ed. 2d 443, 104 S. Ct. 615. There, the Court addressed the issue of whether State courts are preempted under the Atomic Energy Act from assessing punitive damages against defendants that cause injuries by excessive radiation. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n* (1983), 461 U.S. 190, 205, 75 L. Ed. 2d 752, 765, 103 S. Ct. 1713, 1722, the Court had held that under the Atomic Energy Act the States are precluded from regulating the safety aspects of nuclear energy. The defendant argued that a "State-sanctioned award of punitive damages * * * punishes and deters conduct relating to radiation hazards" and therefore should be preempted by the Atomic Energy Act. The Court upheld the award notwithstanding the fact that it would have an incidental regulatory effect, stating:

> "In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that

> safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept." *Silkwood*, 464 U.S. 238, 256, 78 L. Ed. 2d 443, 457, 104 S. Ct. 615, 625.

We note, too, that Congress expressly stated that OSHA was not intended to preempt two bases of liability that, like criminal law, operate to regulate workplace conduct and implicitly set safety standards—State workers' compensation and tort law. Section 4(b)(4) of OSHA provides:

> "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4) (1982).

There is little if any difference in the regulatory effect of punitive damages in tort and criminal penalties under the criminal law. (See Restatement (Second) of Torts § 908, comment *b* (1970).) We see no reason, therefore, why what the Court declared in *Silkwood* should not be applied to the preemptive effect of OSHA. Also, if Congress, in OSHA, explicitly declared it was willing to

accept the incidental regulation imposed by compensatory damages awards under State tort law, it cannot plausibly be argued that it also intended to preempt State criminal law because of its incidental regulatory effect on workplace safety.

It is a contention of the defendants that it is irrelevant that the State is invoking criminal law jurisdiction as long as the conduct charged in an indictment or information is conduct subject to regulation by OSHA. The defendants argue that the test of preemption is whether the conduct for which the State seeks to prosecute is in any way regulated by Federal legislation. The defendants assert that because the conduct charged in the indictments is conduct regulated under OSHA, a State prosecution for that conduct is preempted by OSHA. The contention is not convincing.

Simply because the conduct sought to be regulated in a sense under State criminal law is identical to that conduct made subject to Federal regulation does not result in State law being preempted. When there is no intent shown on the part of Congress to preempt the operation of State law, the "inquiry is whether 'there exists an irreconcilable conflict between the federal and state regulatory schemes.'" (*Rice v. Norman Williams Co.* (1982), 458 U.S. 654, 659, 73 L. Ed. 2d 1042, 1049, 102 S. Ct. 3294, 3298-99; *Huron Portland Cement Co. v. City of Detroit* (1960), 362 U.S. 440, 443, 4 L. Ed. 2d 852, 856, 80 S. Ct. 813, 815; *Amalgamated Association of Street, Electric Ry. & Motor Coach Employees of America v. Lockridge* (1971), 403 U.S. 274, 285-86, 29 L. Ed. 2d 473, 482, 91 S. Ct. 1909, 1917.) A conflict arises where "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 257, 83 S. Ct. 1210, 1217), or when State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"

(*Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 85 L. Ed. 2d 581, 587, 61 S. Ct. 399, 404.

The defendants argue that the prosecutions here would conflict with the purposes of OSHA. They say that Congress intended that under OSHA the Federal government was to have exclusive authority to set occupational health and safety standards. The standards were to be set only after extensive research to assure that the standards would minimize injuries in the workplace but at the same time not be so stringent that compliance would not be economically feasible. (See 29 U.S.C. § 655(b)(5) (1982).) The defendants correctly point out that although the States are given the opportunity to enforce their own occupational health and safety standards, the plan submitted must contain assurances that the State will develop and enforce standards "at least as effective" as OSHA's. (See 29 U.S.C. § 667 (1982).) Even after a State plan is approved, the Occupational Safety and Health Administration retains jurisdiction to enforce its own standards until it determines, based on three years of experience, that the State's administration of the plan is "at least as effective" as OSHA's. 29 U.S.C. § 667 (1982).

The defendants maintain that Federal supervision over State efforts to enforce their own workplace health and safety programs would be thwarted if a State, without prior approval from OSHA officials, could enforce its criminal laws for workplace conduct of employers which is also subject to OSHA standards. They say that the States would thus be permitted to impose standards so burdensome as to exceed the bounds of feasibility or so vague as not to provide clear guidance to employers.

We believe the concern of the defendants is unfounded. We cannot see that State prosecutions of employers for conduct which is regulated by OSHA standards would conflict with the administration of OSHA or be at odds with its goals or purposes. On the contrary, prosecutions of employers who violate State criminal law by failing to main-

tain safe working conditions for their employees will surely further OSHA's stated goal of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions." (29 U.S.C. § 651 (b) (1982).) State criminal law can provide valuable and forceful supplement to insure that workers are more adequately protected and that particular egregious conduct receives appropriate punishment.

The defendants' statements that the State will now have the ability to enforce more stringent standards than OSHA's does not persuade. As stated, the charges here are based on the defendants' alleged willful failure to remove workplace hazards which create a substantial probability that they will cause injuries to their employees. Thus, employers are not left without guidance as to what standard of care they must meet. Too, in practical terms, if a defendant were in compliance with OSHA standards it is unlikely that the State would bring prosecutive action. Enforcement of State criminal law in the workplace will not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404.

To adopt the defendants' interpretation of OSHA would, in effect, convert the statute, which was enacted to create a safe work environment for the nation's workers, into a grant of immunity for employers responsible for serious injuries or deaths of employees. We are sure that that would be a consequence unforeseen by Congress.

The question here has been considered by a few courts. The appellate court of Wisconsin in *State ex rel. Cornellies v. Black* (Wis. App. 1988), 144 Wis. 2d 745, 425 N.W.2d 21, held that the State's authority to enforce its criminal laws in the workplace has not been preempted by OSHA. The court stated:

> "There is nothing in OSHA which we believe indicates a compelling congressional direction that Wis-

> consin, or any other state, may not enforce its homicide laws in the workplace. Nor do we see any conflict between the act and sec. 940.06, Stats. To the contrary, compliance with federal safety and health regulations is consistent, we believe, with the discharge of the state's duty to protect the lives of employees, and all other citizens, through enforcement of its criminal laws. Wisconsin is not attempting to impose a penalty for violation of any safety regulations. It is only attempting to impose the sanctions of the criminal code upon one who allegedly caused the death of another person by reckless conduct. And the fact that that conduct may in some respects violate OSHA safety regulations does not abridge the state's historic power to prosecute crimes." (144 Wis. 2d at 755, 425 N.W.2d at 25.)

(A divided court held to the contrary in *People v. Hegedus* (1988), 169 Mich. App. 62, 425 N.W.2d 729, *leave to appeal granted in part* (1988), 431 Mich. 870, 429 N.W. 2d 598, citing the opinion of our appellate court in this case (157 Ill. App. 3d 797), also held *contra.*)

We would note that on September 27, 1988, the congressional committee on government operations approved and adopted a report on the question of whether State criminal prosecutions for workplace safety violations are preempted by OSHA. The committee concluded that inadequate use has been made of the criminal penalty provisions of the Act and recommended to Congress that "OSHA should take the position that the States have clear authority under the Federal OSH Act, as it is written, to prosecute employers for acts against their employees which constitute crimes under State law." Report of House Comm. on Government Operations, Getting Away with Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations, H.R. Rep. No. 1051, 100th Cong., 2d Sess. 9 (1988).

The People as supplemental authority cite a letter from the Department of Justice to the chairman of the

committee. The letter of the Department of Justice, responding to the report, states in part that the Department shared the concerns of the committee as to the adequacy of the statutory criminal penalties provided for violations of OSHA and also observes:

> "As for the narrower issue as to whether the criminal penalty provisions of the OSH Act were intended to preempt criminal law enforcement in the workplace and preclude the States from enforcing against employers the criminal laws of general application, such as murder, manslaughter, and assault, it is our view that no such general preemption was intended by Congress. As a general matter, we see nothing in the OSH Act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State criminal laws of general applicability."

The defendants offered supplemental authorities also, arguing that the Department's view was not entitled to deference and was not binding on a court. It, of course, does not bind a court and, whether entitled to deference or not, it is certainly not inappropriate to note that the view of the governmental department charged with the enforcement of OSHA is also the view of this court.

In view of our holding that the State is not preempted from conducting prosecutions, we need not address the defendants' motion to strike portions of the State's brief and certain grand jury testimony.

For the reasons given, the judgments of the appellate court and circuit court are reversed and the cause is remanded to the circuit court of Cook County for further proceedings.

Judgments reversed;
cause remanded.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

86-0014

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

vs.

CHICAGO MAGNET WIRE CORPORATION, an Illinois corporation, ANTHONY JORDAN, KEVIN KEANE, GERALD COLBY, ALLAN SIMON and FRANK ASTA,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County

Honorable Earl E. Strayhorn, Judge Presiding

JUSTICE O'CONNOR delivered the opinion of the court:

This is an appeal from an order of the circuit court of Cook County dismissing various indictments and information against Chicago Magnet Wire Corporation (CMW), and five corporate officials, Anthony Jordan, Kevin Keane, Gerald Colby, Allan Simon, and Frank Asta. The sole issue on appeal is whether state criminal prosecutions based on conditions in the workplace are preempted by the Occupational Safety and Health Act of 1970 (OSHA) (29 U.S.C. § 651 *et seq.* (1982).) We affirm.

On June 26, 1985, the Grand Jury of Cook County voted indictments against CMW and five of its corporate

officials, charging each with multiple counts of aggravated battery and reckless conduct pursuant to Ill. Rev. Stat. 1985, ch. 38, pars. 12-4(a) and (c) and 12-5 and with violating the conspiracy statute. Ill Rev. Stat. 1985, ch. 38, par. 8-2(a).

One set of aggravated battery indictments, charging a violation of Ill. Rev. Stat. 1985, ch. 38, par. 12-4(a), alleged that CMW and the individual defendants, while acting in their official capacity, exposed the named employees to numerous federally regulated substances in the workplace; failed to provide necessary safety instructions and equipment and health monitoring systems in the workplace; provided inadequate ventilation in the workplace and maintained dangerously overheated working conditions while the employees were exposed to the federally regulated substances. It was alleged that as a consequence of these acts, defendants violated their duty to provide a safe workplace for employees and caused great bodily harm to the named employees with the conscious awareness that a substantial probability existed that their acts would cause great bodily harm.

The second set of aggravated battery indictments alleged that CMW and the individual defendants knowingly committed acts which would cause named employees to take by deception and for other than medical purposes federally regulated substances and that such acts harmed the employees in violation of Ill. Rev. Stat. 1985, ch. 38, par. 12-4(c).

The reckless conduct charges alleged that defendants, in conducting the business of coating wire, grossly deviated from the standard of care which a reasonable employer would exercise in the same situation and thereby violated their duty to provide a safe workplace in violation of Ill. Rev. Stat. 1985, ch. 38, par. 12-5.

The conspiracy indictment charged both CMW and the individual defendants with conspiring against the

named employees with the intent to commit aggravated battery in violation of Ill. Rev. Stat. 1985, ch. 38, par. 8-2(a).

Defendants filed a joint motion to dismiss and on December 13, 1985, the court dismissed all charges against them, finding that OSHA preempted Illinois from applying Illinois criminal law to conduct involving federally regulated occupational safety and health issues within the workplace. The State filed various informations which were dismissed on the same basis and this appeal followed.

The State contends that the indictments should be reinstated as the prosecutions were undertaken in pursuance of the state's police power which was neither expressly nor impliedly preempted by Congress. The defendants contend that the criminal charges are expressly preempted by OSHA and that the dismissal of the charges should be affirmed.

State laws are preempted when Congress has declared its intent, either explicitly or implicitly, to occupy a certain area of law. (*Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 248, 78 L.Ed. 2d 443, 104 S. Ct. 615; *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305.) Where preemptive intent is not expressly stated in the statute, the intent of Congress must be derived from the statutory language, from the comprehensiveness of the regulatory scheme, from the legislative history of the statute, or from the fact that the Federal and State statutes at issue conflict. (See *Hillsborough County, Florida v. Automated Medical Laboratories* (1985), —— U.S. ——, 85 L.Ed. 2d 714, 105 S. Ct. 2371.) In our view, the comprehensiveness of the Occupational Safety and Health Act, in conjunction with the fact that the states have been afforded the opportunity to develop their own regulatory schemes, evidences a Congressional intent to preempt the State from applying its criminal statutes to

conditions in the workplace that are specifically regulated by OSHA.

Congress enacted OSHA in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." (29 U.S.C. sec. 651(b) (1982).) Section 655 of the Act expressly provides for the adoption of Federal standards of industrial safety, and while the Federal standards are given primacy under the statute, the states are permitted to exercise independent state action under certain circumstances.

A State agency may assert jurisdiction over an occupational safety or health issue if there is no Federal standard in effect (29 U.S.C. sec. 667 (a)), or a State may submit its own enforcement plan to the United States Secretary of Labor for approval pursuant to 29 U.S.C. sec. 667(b). In the absence of a State plan which has been approved by the Secretary of Labor, State laws related to working conditions regulated by OSHA are preempted.

The preemptive effect of section 667(b) was recognized by the Illinois Supreme Court in *Stanislawski v. Industrial Commission* (1983), 99 Ill. 2d 36, 39-40, 457 N.E. 2d 399, in which the court stated that under OSHA, "the only method by which a State may assume responsibility for development and enforcement of safety and health standards with respect to which Federal standards have been adopted" is through an approved State plan under the Act. (See also *United Air Lines, Inc. v. Occupational Safety & Health Appeals Board* (1982), 32 Cal. 3d 762, 772, 654 P.2d 157 (a State is preempted from regulating matters governed by OSHA standards in the absence of the adoption of a federally approved State plan); *Five Migrant Farmworkers v. Hoffman* (1975), 136 N.J. Super. 242, 247, 345 A.2d 378, (OSHA supersedes all State laws with respect to general working conditions).)

Illinois submitted a State plan, but it was withdrawn on June 30, 1975. (See *Stanislawski v. Industrial Commission* (1983), 99 Ill. 2d 36, 39, 457 N.E.2d 399.) The State's position, however, is that it was under no obligation to comply with section 667(b) by developing a State plan in order to prosecute defendants under State criminal laws. The State argues that the preemptive effect of sections 667(a) and (b) is limited to State administrative schemes, such as the one at issue in *Stanislawski*, which duplicate OSHA's regulation of health and safety standards, but that it was not intended to extend to state criminal laws as they might apply in the workplace.

The main thrust of the State's argument is that the prosecutions at issue here are not preempted because they are based on the application of general criminal laws rather than on the enforcement of specific workplace health and safety regulations. To support its assertion that Congress explicitly intended to leave preexisting State criminal laws undisturbed, the state cites section 653(b)(4) of the Act which provides:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. 29 U.S.C. § 653(b)(4) (1982).

In our view, this section of the Act does not permit the State to prosecute conduct or conditions in the workplace under State criminal laws in so far as the conduct or conditions are regulated by OSHA. The courts which have interpreted section 653(b)(4) have consistently found that the purpose of this section was to preserve the existing private rights of injured employees relative to workman's compensation, State tort law, and other

common law remedies against employers but not to create any additional civil remedies in favor of employees. See, *e.g*, *Johnson v. Koppers Co. Inc.* (N.D.Ohio 1981), 524 F.Supp. 1182, 1189, *appeal dismissed* (6th Cir. 1982), 705 F.2d 454; *United Steelworkers of America v. Marshall* (D.C. Cir. 1980), 647 F.2d 1189, 1235-36, *cert. denied* (1981), 453 U.S. 913; *Berardi v. Getty Refining & Marketing Co.* (1980), 435 N.Y.S.2d 212, 215-216, 107 Misc. 2d 451.

The determinative factor is not whether the State is seeking to enforce a criminal law of general application rather than specific workplace health and safety regulations but what conduct the state is seeking to regulate. (See *NDK Corp. v. Local 1550 of the United Food and Commercial Workers International Union* (1984), 128 Ill. App. 3d 207, 470 N.E.2d 565.) The State would not be foreclosed from applying its criminal laws in the workplace if the prosecutions charged the defendants with crimes not involving working conditions. The conduct the State seeks to regulate here, however, as evidenced by the language of the indictments, is conduct related to working conditions now regulated by OSHA. We therefore believe that the trial court properly found that the prosecutions were preempted.

The State's reliance on *Silkwood v. Kerr-McGee Corp.* (1984), 464 US. 238, 78 L. Ed. 2d 443, 104 S. Ct. 615, is misplaced. In *Silkwood*, the Supreme Court reversed a Court of Appeals decision which held that the Atomic Energy Act, and the Nuclear Regulatory Commission established by it, preempted State law and precluded an award of punitive damages for injuries caused by exposure to radiation. The Supreme Court held that the award of punitive damages under State tort law was not preempted in that allowing a plaintiff to recover for injuries caused by nuclear hazards was not inconsistent with the Federal regulatory scheme developed by the Nuclear Regulatory Commission. *Silkwood v. Kerr-McGee*

Corp. (1984), 464 U.S. 239, 257-58, 78 L.Ed.2d 443, 104 S.Ct. 615.

Silkwood was decided under the Atomic Energy Act, to which OSHA does not apply. In addition, the Court in *Silkwood* distinguished between "state regulation of the safety aspects of nuclear energy," which was held preempted, and State law to compensate injured persons, which the Court held was not preempted. Here, although the State characterizes its purpose as punitive and deterrent and therefore permissible under *Silkwood*, in fact it seeks to regulate occupational safety and health through the application of criminal laws, which is impermissible under section 18(b) of OSHA. 29 U.S.C. § 667(b) (1982).

The State has expressed valid and legitimate concerns about the consequences of preemption on its ability to control the activities of employers. But Congress has evidenced an intent that criminal sanctions should not be imposed for activities involving workplace health and safety except in highly limited circumstances, and that health and safety requirements should be established through standard-setting, which provides employers with clear and detailed notice of their legal obligations. Illinois' view that employers may be held criminally liable for workplace injuries or illness, regardless of their compliance with OSHA standards, would lead to piecemeal and inconsistent prosecutions of regulatory violations throughout the states, a result that Congress sought to preclude in enacting OSHA.

For the foregoing reasons, we affirm the decision of the circuit court of Cook County dismissing the indictments against Chicago Magnet Wire and its corporate officers.

Judgment affirmed.

CAMPBELL and BUCKLEY, J.J., concur.

APPENDIX C

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

Indictment Nos. 85 7741, 77
7743, 77
7745, 77
7747

Charge: Aggravated Battery

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

CHICAGO MAGNET WIRE CORP.,
ANTHONY JORDAN, KEVIN KEANE, GERALD COLBY,
ALLAN SIMON, FRANK ASTA

Before JUDGE EARL E. STRAYH

December 13, 1985

Court convened pursuant to adjournment.

PRESENT:

HON. RICHARD M. DALEY
State's Attorney of Cook County

by Mr. Glen C. Sechen and
Ms. Lynn Worlay
Assistant State's Attorneys
appeared on behalf of the People;

Mr. Patrick Tuite
appeared on behalf of Kevin Keane,

Mr. George Catsirilas and
Mr. Robert Stevenson
appeared on behalf of Chicago Magnet Corp.,

Mr. Harvey Silets
appeared on behalf of Anthony Jordan

Mr. William J. Martin
appeared on behalf of Gerald Colby,
Al Simon and Frank Asta.

CLERK: State of Illinois versus Chicago Magnet Wire Corp.

MS. WORLAY: Good morning, Lynn Worlay, Assistant State's Attorney.

MR. TUITE: I'm Patrick Tuite on behalf of Mr. Kevin Keane, who is present in Court.

MR. CATSIRILAS: George Catsirilas and Robert Stevenson on behalf of Chicago Magnet Wire Corp.

MR. SILETS: Harvey Silets on behalf of Anthony Jordan.

MR. MARTIN: William J. Martin on behalf of Mr. Colby, Asta, and Simon.

THE COURT: Either side have anything else they wish to offer over and above what has already been presented?

MR. SECHEN: No, sir, we do not, other than reminding the Court of the motions that we made with respect to amending, and motion to strike the affidavit.

THE COURT: Motion to strike the affidavit is denied.

MR. SECHEN: Thank you, Judge.

THE COURT: Motion to amend—what was that motion to amend?

MR. SECHEN: The clerical error in the indictment with respect—

THE COURT: Allowed.

MR. SECHEN: Thank you.

THE COURT: All right.

I'll render my ruling on the motion to dismiss.

The extended December, 1984 Grand Jury of Cook County has indicted the defendants, corporation, individual corporate officers and management persons in seven indictments, each with multiple counts alleging aggravated battery, wreckless conduct, and conspiracy to commit aggravated battery.

The foundational under, pending all of the charges is that the defendants corporation is charged, officers and named managers in conducting their business, to-wit, a manufacturing plant, which engaged in the business of coating wire with various chemical compounds, and while under the duty to provide a safe work place, and with an awareness that a substantial probability existed which would cause employees of the defendants business to, "take by deception for other than medical purposes, poisonous and stupifying substances, to-wit, substances including not but not limited to: Trichloroethylene, xylene, cresol, phenol, n-methyl-2-tyrrolidon, 4-methyl-2-tenpon ketone, urethane, polyvinyl chloride, toluene diisocyana aluminum dust, copper dust and naphta—that's all over with, to their employees—to their employees.

It is alleged that defendants employees were harmed by exposing them to poisonous and stupifying substances by way of inhallation and skin absorption and by failing to provide necessary safety instructions, safety equipment, and by maintaining an unsafe work place.

The defendants are alleged to have acted knowingly and wilfully.

The defendants have filed consolidated motions to dismiss all charges, asserting that: 1, Federal Law preempts the application of State law to questions arising out of issues of work place safety, where Federal standards have been set.

2, the charges do not state indictable offenses.

3, the conspiracy and aggravated battery Statutes, as applied to defendants', alleged conduct, violate their due process rights.

4, there was insufficient evidence adduced before the Grand Jury to support the return of the indictment.

The parties have each submitted memoranda of opinion and authority in supoprt of their respective motions.

And in addition, the Court has heard each side in oral arguments.

The Court finds, it has jurisdiction over the parties and of the subject matter.

With respect to their assertion of Federal preemption, the defendants' motion raises questions of Federal Constitutional import. They allege that the action of the prosecution in securing the return of these indictments, constitutes, "the indiscriminate and arbitrary prosecution of Illinois corporations and corporate officials for conduct arising from a Federally regulated industrial work environment."

The prosecution disputes this contention, saying, the crimes herein charged, are not regulatory in nature, but malum inse. Malum, M-A-L-U-M I-N-S-E, two words. And are, therefore, outside the pale of Federal regulation and clearly permissible under a State's right to exercise its police powers, to frame the issue more clearly.

The questions presented by this case can be stated thusly: 1, can a State regulate the operation of a work place where the Federal Government has undertaken to legislate in this area?

2, can a State assert criminal jurisdiction over individuals within its borders for inducing work related injuries through conduct in the industrial work environment, although, such conduct is in accord with Federally mandated work place standards?

Federal preemption has its Genesis in Article 6, Clause 2 of the United State's Constitution, which states: "This Constitution and the laws of the United States, which shall be made in pursuance, thereof, and all safety made

or which shall be made under the authority of the United States shall be the Supreme Law of the lands, and the Judges in every State shall be bound. Thereby, anything in the Constitution or Laws of any State to the contrary, notwithstanding."

Semi-final question to be decided in a determination of preemption is congenial intent, where Congress through expressed intent, sets forth in the Statute, asserts an intention to legislate in a particular area and establish standards, preemption occurs.

In 1970, Congress enacted the Occupational Safety and Health Act. The purpose of the act was to insure healthful and safe conditions in the industrial work places in our country.

The Statute requires among other things, that the United States Secretary of Labor establish health standards concerning the use of toxic materials or harmful physical agents on the industrial work floor.

The Statute also provides for Civil and Criminal penalties for intentional violations of safety and health rules.

Congress further limited State action in the area of occupational health and safety to severely restricted areas, that is, where no Federal standard is established. With respect to any occupational health issue a State may assert jurisdiction over that issue.

However, the Federal standards have been set. A State is precluded from exerting jurisdiction over the issue, unless it has been submitted and had approved by the United States Secretary of Labor, an enforcement plan.

Illinois has not had approved any State enforcement plan respecting toxic materials or harmful substances.

As to the doctrine of preemption, which is a well recognized principle in Federal Law, our State Supreme Court has spoken.

In Stanislowski versus the Industrial Commission, 88 Illinois, 2nd, 36, 457 Northeast, 2nd, 388, decided in 1973.

The Illinois Industrial Commission in denying an award, ruled, "by reason of the enactment of the Occupational Safety and Health Act, all States' enforcement of industrial safety laws, is preempted."

In affirming the commission, our Illinois Supreme Court through Mr. Justice Goldenhirst, stated, and I quote: In view of our holding that the adoption of standards was preempted, and that no plan was adopted under which the State would assume jurisdiction, there was no standard in force and effect, the commission correctly held that the matter was preempted."

OSHA having set standards governing the use of toxic materials and harmful substances in the work place and Illinois being bereaved of any approved standards in this area, People of the State of Illinois are precluded from exercising Criminal jurisdiction over defendants in the manner attempted here under, under the reciprocity clause of the United States Constitution.

And defendant's motion to quash each of these indictments is—and the same, is hereby sustained.

Having ruled on this matter, on the basis of Federal preemption, the Court expresses no opinion regarding the issue of due process, or the sufficiency of the indictments to state a cause of action or prosecutorial misconduct. Other matters which were asserted by the defendants as being a basis for a motion to dismiss.

The defendants are, hereby, discharged, and their bond is exonerated.

APPENDIX D

Ill. Rev. Stat. ch. 38, § 8-2. Conspiracy

(a) Elements of the offense. A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

(b) Co-conspirators.

It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

(1) Has not been prosecuted or convicted, or

(2) Has been convicted of a different offense, or

(3) Is not amenable to justice, or

(4) Has been acquitted, or

(5) Lacked the capacity to commit an offense.

(c) Penalty.

A person convicted of conspiracy may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy, except that if the object is an offense prohibited by Sections 11-15, 11-16, 11-17, 11-19, 24-1(a)(1), 24-1(a)(7), 28-1, 28-3 and 28-4 of the "Criminal Code of 1961", approved July 28, 1961, as amended or prohibited by Sections 401, 402, 403, 404, 406(b) or 407 of the "Illinois Controlled Substances Act", enacted by the 77th General Assembly,[1] or an inchoate offense related to any of the aforesaid principal offenses the person convicted may be imprisoned not to exceed 10 years: Provided, however, that no penalty for conspiracy to commit treason, murder, or

aggravated kidnapping shall exceed imprisonment for 20 years, and no penalty for conspiracy to commit any offense other than those specified in this subsection shall exceed imprisonment for 5 years. Laws 1961, p. 1983, § 8-2, eff. Jan. 1, 1962. Amended by Laws 1965, p. 406, § 1, eff. July 1, 1965; P.A. 77-772, § 1.

Ill. Rev. Stat. ch. 38, § 12-4. Aggravated Battery

(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.

(b) A person who, in committing a battery either:

(1) Uses a deadly weapon;

(2) Is hooded, robed or masked, in such manner as to conceal his identity;

(3) Knows the individual harmed to be a teacher or other person employed in any school and such teacher or other employee is upon the grounds of a school or grounds adjacent thereto, or is in any part of a building used for school purposes;

(4) Knows the individual harmed to be a supervisor, director, instructor or other person employed in any park district and such supervisor, director, instructor or other employee is upon the grounds of the park or gounds adjacent thereto, or is in any part of a building used for park purposes;

(5) Knows the individual harmed to be a caseworker or other person employed by the State Department of Public Aid or a County Department of Public Aid and such caseworker, investigator, or other person is upon the grounds of a Public Aid office or grounds adjacent thereto, or is in any part of a building used for Public Aid purposes, or upon the grounds of a home of a public aid applicant, recipient, or any other person being inter-

viewed or investigated in the employee's discharge of his duties, or on grounds adjacent thereto, or is in any part of a building in which the applicant, recipient, or other such person resides or is located;

(6) Knows the individual harmed to be a peace officer, or a person summoned and directed by him, or a correctional officer, while such officer is engaged in the execution of any of his official duties including arrest or attempted arrest;

(7) Knows the individual harmed to be a fireman engaged in the execution of any of his official duties;

(8) Is, or the person battered is, on or about a public way, public property or public place of accommodation or amusement; or

(9) Knows the individual harmed to be the driver, operator, employee or passenger of any transportation facility or system engaged in the business of transportation of the public for hire and the individual assaulted is then performing in such capacity or then using such public transportation as a passenger or using any area of any description designated by the transportation facility or system as a vehicle boarding, departure, or transfer location commits aggravated battery.

(c) A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any intoxicating, poisonous, stupefying, narcotic or anesthetic substance commits aggravated battery.

(d) Sentence.

Aggravated battery is a Class 3 felony.

Ill. Rev. Stat. ch. 38, § 12-5. Reckless Conduct

(a) A person who causes bodily harm to or endangers the bodily safety of an individual by any means, com-

mits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful.

(b) Sentence.

Reckless conduct is a Class A misdemeanor.

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No. 88-1783

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Petitioners,

v.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

I. Since this case was dismissed prior to there being any contested factual hearings, there are a number of factual issues which are in contest. The best example of such an issue is Petitioners' contention that they were in compliance with OSHA standards and regulations. Respondent denies this contention. It is submitted, therefore, that the facts in this case have not been sufficiently developed at this time to merit review by this Court.

II. The cases which Petitioners contend raise irreconcilable conflicts between the States on the issue of federal pre-emption of state criminal prosecutions are, in fact, neither necessarily irreconcilable, nor in absolute conflict. In fact, all the cases relied upon by Petitioners are factually distinguishable, almost all were decided in reliance upon a subsequently reversed appellate opinion in the case below, and several are actually consistent in principal with the holding of the Illinois supreme court in the case below. Moreover, since no state court of last resort, except the Illinois supreme court, has decided whether OSHA pre-empts such criminal prosecutions, it is submitted that further development by the States in this area would be appropriate before this issue is reviewed. Respondent suggests that, in fact, it is probable that no conflict will be found to exist once this issue is decided by the supreme courts of the various states where it is pending.

III. It is not clear from the factual record in this case that all of the substances involved in the charges implicate OSHA standards, nor does it affirmatively appear that OSHA standards specifically apply to absorption through the skin of all of the substances involved in this prosecution. The facts in this case should, therefore, be more fully developed before review by this Court is entertained.

IV. The instant prosecutions involve the exercise by the State of Illinois of its historic police power to punish, as a matter of retributive justice, crimes which occur within its borders, no matter in what setting those crimes may take place. Congress, in enacting the Occupational Safety and Health Act, intended primarily to create safe and healthful working conditions for the workers of America, and to further that objective, established a system whereby certain national minimum standards would be established, below which employers could not fall. Congress did

not expressly pre-empt the States from prosecuting persons who commit crimes in the workplace, nor did it intend to immunize employers as a class from criminal prosecution for the criminally motivated death or injury of their employees. Evidence of Congressional intent not to preempt may be found in the language and structure of the Occupational Safety and Health Act itself, most specifically in its statement of purpose, its broad savings clause, its reservation of power to the States, and in its enactment of misdemeanor criminal penalties to punish only *standard* violations, rather than substantive offenses such as Murder, Aggravated Battery, and Conspiracy. State prosecutions, such as that in the case below, do not conflict with the purpose of OSHA, nor do they in any way obstruct its application. Therefore, such prosecutions cannot have been intended by Congress to be pre-empted.

ARGUMENT

In making this response to the arguments of Petitioners for a grant of Certiorari, Respondents in no way dispute or diminish the importance of the question of whether or not the States, in the exercise of their historic police powers, are to be permitted to continue the prosecution of criminal offenders in the work setting. Certainly, the question of whether the Occupational Safety and Health Act, in conjunction with Article VI, Clause 2 of the Constitution of the United States, should be read to preempt, and thereby to immunize, an entire class of persons from

such prosecutions is an important issue.[1] Certiorari ought not to be denied, therefore, because the question is unimportant, but for a number of other reasons, which include: (1) the presently undeveloped and unclear factual posture of this lawsuit; (2) the lack of opportunity for courts of last resort in the several states to develop and decide precedent in this area; (3) the clear inapplicability of the Occupational Safety and Health Act to a large proportion of the underlying case; and (4) the correctness of the decision of the Supreme Court of Illinois and the relative clarity of the issues and statutes involved.

I.

THIS CASE, HAVING BEEN DISMISSED PRIOR TO ANY FACTUAL HEARING ON ITS MERITS, IS INSUFFICIENTLY DEVELOPED FOR CONSIDERATION BY THIS COURT AT THIS TIME.

No contested factual hearings were ever had in this case. The Indictments and Informations which charged Petitioners with Aggravated Battery, Reckless Conduct, and Conspiracy against some 42 victims were dismissed, as pre-empted by OSHA and the Supremacy Clause of the Constitution of the United States, prior to any trial on the merits.

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[1] Although Petitioners now argue the importance of the preemption question and bluntly state that the issue is "a recurring one which ultimately will have to be resolved by this Court," (e.g., Petition p. 21) such was not always the case. In their Response to the State's Petition For Leave To Appeal to the Supreme Court of Illinois, Petitioners in this Court took the implicit position that the issues in this case presented no questions of "general importance." (Response to Petition For Leave To Appeal, pp. 2-3, and n. 1) Nevertheless, Respondents agree that the questions were then, and are now, important.

Therefore, although this case may or may not be "ripe" in a strictly technical sense, Respondent submits that it is insufficiently developed as a matter of discretionary review, for consideration by this Court at this time.

A prime example of why this is so may be found in the conflict between Petitioners' assertions that they are being prosecuted despite being in compliance with OSHA standards, (See Petition, pp. 18 and 21) and Respondent's contention that, whether or not Petitioners had ever been cited by OSHA for standard violations, they were, in fact, in violation of those standards.[2]

Respondent respectfully suggests that it is impossible, at this stage of these proceedings, to determine the validity of invalidity of Petitioner's factual arguments, and that since their assertions are contested by Respondent, it would be inappropriate at this time to assume their truth.

Accordingly, Respondent submits that this matter is not ripe, in the practical sense, for consideration by this Court at this time. Respondent therefore respectfully urges for

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[2] Respondent reiterates that this prosecution is based upon the historic right of the States to exercise their police power to punish crimes committed within their respective jurisdictions as a matter of retributive justice. This is not, nor has it ever been, an attempt to set or enforce OSHA standards. Accordingly, since this is not an enforcement action, no standard violations were alleged. Violative conduct, as will be seen, although not material, may be highly relevant to the material issue of Petitioners' mental states. (See footnote 27, *infra*.) Evidence of compliance or non-compliance with OSHA Standards may be introduced on this issue by either side, and a factual determination, followed by a legal conclusion, made on this and the other evidence. Respondent respectfully submits, however, that Petitioners ought to not expect this Honorable Court to make those factual determinations. Rather, the case should first be litigated to determine the validity or invalidity of Petitioners' contentions, and whether or not they are germane.

any or all of the foregoing reasons, that Certiorari be denied.

II.

THE FEW CASES WHICH HAVE ARISEN IN THIS AREA, MOST OF WHICH HAVE NOT YET REACHED THE COURTS OF LAST RESORT IN THEIR RESPECTIVE JURISDICTIONS, ARE BOTH FACTUALLY DISTINGUISHABLE, AND AT THE SAME TIME, NOT ALL IRRECONCILABLY INCONSISTENT IN PRINCIPAL FROM THE DECISION OF THE COURT BELOW. TIME IS NEEDED FOR FURTHER DEVELOPMENT OF THE LAW IN THIS AREA BY THE SEVERAL STATES.

Petitioners take the position that certiorari ought to be granted because the holding of the Supreme Court of Illinois in this case is inconsistent with opinions in other jurisdictions. (Petition p. 19) Petitioners then cite some of these cases to support their argument.

Respondent maintains, however, that the cases relied upon by Petitioners are either distinguishable, not all that different from the decision of the Illinois high court in principal, have not yet reached the court of last resort in the state where the issue is being litigated, or were overly dependent upon the Illinois appellate court's erroneous, and since reversed, decision in the case below.

Respondent will deal with each of these cases *seriatim*.

Petitioners rely upon *Sabine Consolidated, Inc. v. Texas*, 756 S.W. 2d 865 (Texas App., 1988), a case in which the State of Texas, based its prosecution for negligent homicide upon the "general duty clause" of a state occupational safety and health statute. It is unclear from the opinion whether or not the State of Texas ever obtained approval for its health and safety statute, but presuming that it did not have an approved plan at the

time the prosecutions were brought,[3] the safety statute upon which the prosecution was based was itself pre-empted. Subsequent dictum of the Texas Court notwithstanding, Respondent submits that had the Illinois prosecutions at bar been based upon a similar Illinois statute, the result in the Illinois supreme court in this case might have been the same as it was in *Sabine*.[4] In this particular respect, *Sabine* is not only factually distinguishable from, but is not necessarily all that different in principal from the opinion below. Finally, the Court in *Sabine* bottomed its opinion upon the Illinois appellate court's subsequently reversed opinion in the instant case, so its precedental value is questionable.

Petitioners further cite *Colorado v. Kelran Construction, Inc.*, 13 OSHC 1898 (Dist. Ct. Colo. Oct. 6, 1988), a Colorado trial court opinion which not only placed heavy reliance upon the appellate court opinion below, but which

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[3] According to 29 C.F.R. §1902.4(c)(xi), at the time of the Texas prosecutions twenty-one states, one territory and one commonwealth had obtained federal approval for plans they had enacted. These jurisdictions were: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington and Wyoming. Texas apparently did *not* have an approved plan.

[4] Petitioners, in fact, relied heavily upon the case of *Stanislawski v. Industrial Commission*, 99 Ill. 2d 36, 457, N.E. 2d 399, 75 Ill. Dec. 405 (1983), in both the Illinois appellate court and the Illinois supreme court. *Stanislawski*, held that the old Illinois Health and Safety Act, under which Stanislawski sought to recover additional worker's compensation benefits, had been preempted by OSHA. Although the appellate court's opinion mentioned *Stanislawski*, the supreme court's opinion does not, due primarily to its successful distinguishment and its facial inapplicability. (the instant prosecution is not based upon the pre-empted standards contained in an old act.) Texas apparently *did* base its prosecution upon standards contained in a pre-empted act.

seemed to seek guidance from the then as yet undecided Illinois supreme court.[5] Respondent is somewhat surprised that Petitioners would rely on this case, since it appears that it would have been decided differently if the Colorado judge had waited for the opinion he was seeking. The case is also distinguishable because the State stipulated in *Kelran* that the conduct of the defendant, as well as the cause of death of the victims, were controlled by OSHA. This is not true in the instant case.

Thornock v. State, 745 P.2d 324 (Mont., 1987), was an action against the State of Montana by an injured worker for recovery in addition to worker's compensation benefits. Thornock premised his claim, as did Stanislawski in Illinois,[6] upon an old safety law, since preempted by OSHA. Respondent suggests that had this same suit been brought in Illinois, the result would have been the same under *Stanislawski v. Industrial Commission.*[7]

Finally, Petitioners cite *People v. Hegedus*, 169 Mich. App. 62, 425 N.W. 2d 729 (1988), leave to appeal granted in 429 N.W. 2d 593 (Mich. 1988) a non-unanimous decision by a Michigan appellate court which for Respondent, represents a prophecy fulfilled.

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[5] The Colorado judge noted, on page 8 of his slip opinion: "The Court has recently inquired of the Illinois (s)upreme (c)ourt because the court is aware that the decision of the Illinois Court of Appeals (sic) has been appealed to it. The docket number in the Illinois Supreme Court is 65588 and oral argument was heard on March 23, 1988. A decision may be rendered as soon as October 20, 1988 (in fact, decision was rendered February 2, 1989) but may also be somewhat later than that. In any event, there is no decision by that Supreme Court or the highest court in any of the states mentioned."

[6] See footnote 4, *id.*

[7] See footnote 4, *id.*, 99 Ill. 2d 36, 457 N.E. 2d 399, 75 Ill. Dec. 405 (1983).

In the courts below Petitioners explicitly argued that the state would be permitted to conduct prosecutions, such as that at bar, if they obtained approval for a plan from the Secretary of Labor. They implicitly make the same argument here. (See, Petition, pp. 6, 14) Respondents pointed out that the implications of Petitioner's arguments were frightening, for according to the position taken by Petitioners, a prerequisite to criminal justice for persons who work for a living will be the adoption and approval by their State, of a state safety plan, which the State must take to Washington for presentment to the Secretary of Labor (a non-elected official) for approval. If the plan is approved, the state must then create a huge bureaucracy with its attendant added expense to the taxpayers (who are already paying for OSHA), and it must share its authority with the federal government for a period of three years, after which, it may assume full responsibility for health and safety, and presumably, also for the enforcement of its own criminal laws.[8]

Respondent also made the following argument:

> Woe be unto the state which fails to dot every "i" and to cross every "t" under Defendants' theory of preemption, for states which do not include every conceivable crime in the "plan" will not be permitted to prosecute them. Under the approach advocated by the defendants to the Constitution, state and local legislators would have to appear regularly before the Secretary of Labor, hat in hand, every time local

[8] Space limitations prohibit exploration of all of the ramifications of §667 of OSHA if held to apply to state criminal laws of general application, but one such issue is whether Congress has the Constitutional Authority to delegate the power of discretionary preemption to the unelected head of an administrative agency, to preempt local criminal laws or their enforcement.

> needs dictated the necessity for new or modified criminal legislation which might have some impact upon the workplace. The unelected secretary would then pass upon which criminal laws local prosecutors could enforce, and which they could not. The absurdity of this situation is exceeded only by its corrosive effect upon our federal system and the constitutional rights of the several states to exist in our federal union as partners, junior though they may be, with the national authority. . . . The offensive cast of the defendants' preemption theory, seen in the glaring light of its ultimate consequences, carries with it its own conclusion. Defendants preemption theory must be rejected, and the People must be permitted to proceed against them in criminal court. (Reply Br., Supreme Court of Illinois, pp. 21-22)

The reason Respondent's have taken the admittedly unusual step of quoting from their own brief in the court below is to illustrate, in light of the Michigan appellate court's decision in *People v. Hegedus*,[9] that the fears expressed by Respondents in the court below were in imminent danger of becoming a reality, prior to the Illinois supreme court's decision.

Michigan is a state *with* an approved OSHA plan.[10] Nevertheless, the Michigan appellate court forbade the prosecution of the defendant for involuntary manslaughter on grounds of federal pre-emption, because:

> Although MIOSHA is a federally approved state plan and contains criminal penalties in excess of OSHA, the prosecution here is not under MIOSHA. Instead, the prosecution is attempting to bring general criminal charges against defendant. This attempt to

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[9] 169 Mich. App. 62, 425 N.W. 2d 729 (Mich. App. 1988).

[10] Mich. Stat. Ann. §17.50(i) *et seq.*

> circumvent the penalties in MIOSHA is also an attempt to assert jurisdiction over a federally covered occupational safety and health issue other than through an approved state plan.[11]

Fortunately for criminal justice, the Michigan Supreme Court has accepted this case for review,[12] and since the appellate court relied heavily upon the since reversed decision in the case below, the final resolution of this case may yet be different.

In sum, most of the decisions cited by Petitioners are distinguishable, and consequently not of the type to create a clear difference of opinion and consequent irreconcilable split of authority between the states. Moreover, no state high court, save that of Illinois in the case below, has yet passed on the issue of prosecutions of employers, such as that at bar, which are based on criminal laws of general application.

Respondent submits that given time, these issues will be resolved by the various states in a consistent, and constitutional manner.

Accordingly, for all or any of the foregoing reasons, Respondent respectfully requests that certiorari be denied.

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[11] *People v. Hegedus*, 169 Mich. App. 62, 425 N.W. 2d 729 at 731 (Mich. App. 1988). However, see the dissent of Danhoff, C.J., 425 N.W. 2d at 732.

[12] 429 N.W. 2d 593.

III.

SINCE FULLY ONE-HALF OF THE CHARGES MAY NOT EVEN BE SUBJECT TO THE PREEMPTION ARGUMENT, A GRANT OF CERTIORARI AT THIS TIME WOULD BE PREMATURE.

It is not apparent from the record on appeal in the case below whether all of the substances alleged to have been inhaled by the multiple victims in this case are substances for which OSHA standards are in effect, and it is open to question how many, if any, of those substances are specifically covered by standards regulating skin absorption, which means that fully one-half, or even more than one-half of the charges in the instant prosecution may not be specifically mentioned by OSHA "standards" at all.

This lack of clarity is due, in part, to the early stage at which these charges were dismissed.

It is respectfully submitted that further factual proceedings are necessary to clarify this, and the other issues before this Court before this case becomes one that is suitable for review on certiorari.

Accordingly, Respondent respectfully requests that for all or any of the foregoing reasons, certiorari be denied.

IV.

THE ISSUE OF WHETHER THE STATES MAY PROSECUTE CRIMES OCCURRING IN THE WORKPLACE, IN THE EXERCISE OF THEIR HISTORIC POLICE POWERS, OR WHETHER THE OCCUPATIONAL SAFETY AND HEALTH ACT, AN ACT PRIMARILY CONCERNED WITH THE PROMOTION OF WORKER SAFETY, PREEMPTS SUCH PROSECUTIONS, IS NOT A CLOSE QUESTION, AND WAS CORRECTLY RESOLVED AGAINST SUCH PREEMPTION BY THE SUPREME COURT OF ILLINOIS.

The entire argument of Petitioners is based upon several incorrect premises. Once these premises are examined closely and seen to be incorrect, the entire preemption argument in this case may be seen for what it really is: a hyper-technical and confused misapplication or misreading of the Occupational Safety and Health Act ("OSHA", or the "OSH Act"), and the mistaken emphasis of some of its provisions at the expense of others.

Viewed in context, as it was by the Illinois supreme court, the OSH Act does not support Petitioners' preemption theory, and in fact, does not present a question sufficiently close to merit a grant of certiorari by this Court.

A. Viewed In Context, The OSH Act Neither Expressly Nor Impliedly Preempts Prosecution By The States Of Crimes Occurring In The Workplace.

The underlying prosecution involves Indictments and Informations against the Chicago Magnet Wire Corporation, and five of its top executives, including Petitioner Frank Asta, for multiple counts of Aggravated Battery,[13] Reck-

[13] Ill. Rev. Stat., 1984, Ch. 38, §12-4(a), and (b)(12)(c) in conjunction with §12-3(a).

less Conduct,[14] and Conspiracy,[15] all of which are alleged to be in the violation of the generally applicable laws of the State of Illinois. Illinois is a State which has elected not to create its own state occupational health and safety administration, having withdrawn a previously submitted safety and health plan from consideration by the Secretary of Labor. The statutes under which Petitioners are charged do not, by their terms, purport to regulate health and safety issues, or the work environment, but rather, are criminal statutes of general application, applicable to all persons, and to all classes of persons, in the State of Illinois.

The OSH Act contains an extensive and explicit statement of the Congressional purpose behind its creation.[16] Although Petitioners seek to sprinkle their argument with references to legislative "history," and the statements of certain Congressmen, resort to such devices are neither necessary nor desirable where, as here, the congressional intent is clear from the face of the legislation itself. As this Court noted recently in another case, Congressional intent is "best determined by the statutory language (Congress) chooses. . . . (and) (C)ongressional silence, no matter how 'clanging', cannot override the words of the statute." *Sedima S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 495 n. 13, 105 S.Ct. 3275, 3285 n.13, 87 L. Ed. 2d 346, 358 n.13 (1985).

It is by now well established that the principal congressional purpose behind the OSH Act was the provision to the workers of America of "safe and healthful working

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[14] Ill. Rev. Stat., 1984, Ch. 38, §12-5(a).

[15] Ill. Rev. Stat., 1984, Ch. 38, §8-2.

[16] 29 U.S.C. §651(b).

conditions" and the preservation of our precious "human resources." See, 29 U.S.C. §651(b) and, *Taylor Diving and Salvage Co., Inc. v. United States Department of Labor*, 599 F.2d 622 (5th Cir. 1979); *Anning-Johnson Co. v. O.S.H.R.C.*, 516 F.2d 1081 (7th Cir. 1975); *RMI Co. v. Secretary of Labor*, 594 F.2d 566 (6th Cir. 1979); *American Smelting and Refining Co. v. O.S.H.R.C.*, 501 F.2d 504 (8th Cir. 1974).

The structure of the OSH Act clearly indicates that Congress intended to accomplish these objectives by inviting the active participation of the States, and by setting certain *minimum standards* below which no employer could fall. To assure the accomplishment of these objectives, Congress required that all state plans designed to regulate health and safety in the workplace be approved by the Secretary of Labor. See, 29 U.S.C. §§651(b)(3), and (11), 667(b), 667(c)(2); and compare *American Federation of Labor and Congress of Industrial Organizations, Industrial Union Dept. v. Marshall*, 570 F.2d 1030 (D.C. Cir. 1978).

Petitioners have taken this simple, straightforward approach to worker safety and, with the addition of many sources not found in the statute, have sought to create a subtle, but significant change. Implicit in Petitioners' argument is the assumption that the creation of the OSH Act was intended to create a mandatory *uniform* national standard, rather than a mandatory *minimum* national standard for workplace safety. (See, Petition at pp. 10, 16-17) This is the first, the most subtle, and one of the more dangerous misassumptions indulged in by the Petitioners, and its exposure and refutation is fatal to their argument.

It is submitted that the Supreme Court of Illinois correctly held that "the purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards." (Citing *United Airlines, Inc. v. Occupational Safety & Health Appeals Board*, 32 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982)) (Opinion, Petition at p. 10a).

A contrary construction, particularly the more expansive one implicitly advocated by Petitioners, squares with neither the structure nor the provisions of the OSH Act. For example, the very provision which mandates review of submitted plans by the Secretary of Labor anticipates differences between them.[17] So does the provision encouraging the several States to assume full responsibility for their own safety and health laws within the context of their own individualized needs,[18] and the broad "savings clause" leaving intact an employers' liabilities and his responsibilities and duties to employees under *any law*.[19] The Illinois supreme court's interpretation of OSHA's basic structure and purpose is also consistent with the opinions of other courts which have approached this issue. Compare, *American Federation of Labor and Congress of Industrial Organizations, Industrial Union Dept. v. Marshall*, 570 F.2d 1030, 1042-1043 (D.C. Cir. 1978) (Concurring Opinion).

This distinction between mandatory *minimum* standards and mandatory *uniform* standards is an important one, because only under the latter can Petitioners hope to

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[17] 29 U.S.C. §667(c)(2).

[18] 29 U.S.C. §651(11).

[19] 29 U.S.C. §653(b)(4).

justify the argument that "(r)egardless of whether such *ad hoc* state standards are more 'strict' or more 'lenient,' application of a different standard to conduct and conditions in compliance with OSHA standards conflicts with Congress' objective of creating uniform and balanced workplace safety standards." (Petition at p. 16) (emphasis original)[20] Since the criterion established by Congress is "mandatory minimum," not "mandatory uniform" many

[20] Petitioners do not explain either here, or at any other place in their Petition, exactly how the charges in the instant case actually conflict with any existing OSHA standard. Petitioners then compound their error in interpreting OSHA by indulging in gross speculation about "local standards" being "established on a subjective and post-hoc basis", which will result in the establishment of an entire "secondary" level of standards, where "local authorities will simply decide, without guidance, whether to deem a particular workplace environment 'safe'—regardless of what standards the federal government, under OSHA, has established to regulate that environment." (Petition at p. 17) "Under the decision below", Petitioners prognosticate, "local prosecutors will have the discretion to use imprecise judgment as to workplace safety to indict an employer or even, in extreme cases, for purposes of political harassment." (Petition p. 18) This lop-sided and irresponsible view of federalism is not only presumptuous and completely without support in the record of the instant case, but it also ignores the following facts: (1) If Congress had believed Petitioners groundless fears to be valid, it could have expressly preempted such prosecutions and would not additionally have invited the States to create and enforce their own health and safety plans; (2) An exclusively federal approach is not the only answer, nor are federal agencies inherently any more energetic, expert or honest than their State counterparts. Some of the fears expressed by Petitioners have allegedly already become realities in the area of criminal prosecution under federal OSHA (See, Report of House Committee on Government Operations, "Getting Away With Murder In The Workplace: OSHA's Nonuse of Criminal Penalties For Safety Violations," H.R. Rep. No. 1051, 100th Cong. 2nd Sess. 9 [1988]); (3) the element of scienter in a criminal case would be, in the practical sense, impossible to prove if OSHA standards were complied with; and (4) OSHA has no comparable criminal penalties.

of the policy arguments advanced by Petitioners are invalid.

Even more importantly, the prosecution of criminal offenses under state criminal laws of general application cannot be preempted by OSHA because such prosecutions do not equate with the enforcement of health and safety "standards", as the term "standard" is defined in the OSH Act.[21]

This Court has held that the analysis to discover whether a state law is to be preempted by federal legislation consists of two major prongs. The first of the two prongs consists of an analysis of the federal statute itself to determine whether Congress has used language which would constitute an "express" preemption of the state statute in question. See, *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 203, 103 S.Ct. 1713, 1722, 75 L.Ed. 2d 752, 765 (1983). If no express preemption is found, a state law may still be held to have been impliedly preempted if preemption was intended by Congress. *Fidelity Federal Savings and Loan Assn. v. De La Cuesta*, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3022, 73 L.Ed. 2d 664, 674-675 (1982). Preemption may be implied in several ways. First, preemption may be inferred where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L. Ed. 2d 714, 721, (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947). Sec-

[21] 29 U.S.C. §652(8).

ond, preemption may be inferred where " '(t)he object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " *Fidelity Federal Savings and Loan v. De La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed 2d 664, 675 (1982), quoting *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed 1447, 1459 (1947). Third, preemption may be inferred where the regulated field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

"Where, (however) the field which Congress is said to have preempted has been traditionally occupied by the States . . . 'we start with the assumption that the historic powers of the States were not to be superceded by the Federal Act unless (pre-emption) was the clear and manifest purpose of Congress.' " *Jones v. Rath Packing Company*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L. Ed. 2d 604, 614 (1977).

The power to prosecute crimes is one which has rested traditionally with the States. See, *Knapp v. Schweitzer*, 357 U.S. 371, 375, 78 S.Ct. 1302, 1305, 2 L.Ed 2d 1393 (1958); *Patterson v. New York*, 432 U.S. 197, 201, 97 S.Ct. 2319, 2322, 53 L. Ed. 2d 281, 287 (1977). In the State of Illinois, the enactment of criminal statutes, the enforcement of the criminal law, and the sentencing of convicted criminals are an exercise by the State of its traditional police power. See, *People v. Alejos*, 97 Ill. 2d 502, 455 N.E. 2d 48, 74 Ill. Dec. 18 (1983); *People v. Bradley*, 79

Ill. 2d 410, 417, 403 N.E. 2d 1029 (1979); *People v. Coleman*, 111 Ill. 2d 87, 488 N.E. 2d 1009, 1013-1014 (1986).

Where the state's police power is involved, courts are reluctant to find preemption unless the preemptive intent is "clearly indicated," *Maurer v. Hamilton*, 309 U.S. 598, 614, 60 S.Ct. 726, 734, 84 L.Ed. 969 (1940); "definitely expressed," *H.P. Welsh Co. v. New Hampshire*, 306 U.S. 79, 85, 59 S.Ct. 438, 441, 83 L.Ed. 500 (1959); "clear and manifest," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); and "unmistakably . . . ordained [by Congress.]" *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L. Ed. 2d 248, 257 (1963). Otherwise, there is a presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed. 2d 576, 595 (1981); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

(1) Congress Did Not Expressly Preempt State Criminal Prosecution Of Offenses Occurring In The Workplace.

The OSH Act contains no provision which expressly precludes all state-action in the workplace, nor one which precludes criminal prosecutions. To the contrary, it contains several provisions which militate against the idea of preemption. For example, Section 653(b)(4)[22] specifically leaves intact all laws relating to the rights, duties and liabilities of both employers and employees under *any* law with respect to injuries, diseases, or the death of employees arising out of, or in the course of employment. Section 667(a)[23] even permits the States to take jurisdic-

[22] 29 U.S.C. §653(b)(4).

[23] 29 U.S.C. §667(a).

tion directly over health and safety issues themselves where no OSHA Standards are in effect. Moreover, the complete lack of serious criminal penalties also evidences a lack of desire on the part of Congress to become involved in the area of criminal jurisprudence, and indicates that the primary thrust of the standard enforcement effort is to be through civil, rather than through criminal sanctions.[24] The legislative history of the OSH Act is not inconsistent with this philosophy.

The setting or enforcing of occupational safety and health "standards" pursuant to §667(b)[25] is not the same thing as punishing an injury to, or the death of, a worker where that injury or death is criminally motivated. Neither the criminal statutes in question, nor the charging documents in this case even mention occupational safety and health "standards." Accordingly, there can be no "express" preemption.

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[24] The only section of the OSH Act which contains a provision even remotely resembling the offenses with which Petitioners are charged is 29 U.S.C. §666(e), which provides misdemeanor sanctions for willful *standard* violations resulting in the death of an employee. No deaths are alleged in the instant case, and there is no attempt in the statute to punish substantive offenses, only violations of OSHA standards. Even so, from OSHA's passage in 1970, to February, 1988, only 42 cases were referred by OSHA for criminal prosecution. Only 14 of those cases were prosecuted, and only 10 of those resulted in criminal convictions. In the entire 18-year history of OSHA, up to February, 1988, no one had ever spent one day in jail for any criminal offense, despite the fact that during this period more than 100,000 American workers lost their lives because of unsafe working conditions. Report of House Committee on Government Operations, "Getting Away With Murder In The Workplace: OSHA's Nonuse Of Criminal Penalties For Safety Violations," H.R. Rep. No. 1051, 100th Congress, 2nd Session 9 (1988) (pp. 3-4).

[25] 29 U.S.C. §667(b).

For the foregoing reasons, therefore, Respondents urge that Certiorari be denied.

(2) Since The Primary Purpose Of Congress, When Enacting OSHA, Was The Promotion Of Safe And Healthful Working Conditions For The Workers Of America, Congress Could Not Have Intended To Accomplish Its Objective By Immunizing Those Few Unscrupulous Employers Who Knowingly Commit Crimes Against Those Workers, And The Doctrine Of Implied Preemption Is Therefore Inapplicable.

The theory which is the necessary underpinning of Petitioners' implied preemption arguments, is based upon a fundamentally faulty premise, to-wit: That the criminal prosecution of certain unscrupulous employers, who knowingly, intentionally, or wilfully injure or kill their employees, equates with the enforcement of health and safety standards. Petitioners then add unnecessary complexity to the problem by speculating about the supposedly inconsistent results such prosecutions will have on the regulatory effort nationally, and by disingenuously implying that they (Petitioners) were in compliance with OSHA Standards and are thereby being unjustly prosecuted.[26]

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[26] Petitioners' assertion that they are being unjustly prosecuted is contained in their statement that. . . (I)t seems plain that Congress' intent to encourage employer cooperation will be thwarted if employers (*such as petitioners*) *who comply with OSH Act Standards* become subject to local prosecution. (emphasis supplied) (Petition at p. 18 and also see p. 21) This none too subtle argument is improper because Petitioners were dismissed prior to any factual hearing or trial in this case, and thus the question of whether the allegedly egregious conduct of Petitioners violated any OSHA standards was never heard. Because of the implication that the State of Illinois is engaging in this type of conduct, Respondent has attached, as Appendix "A" to this brief, the Statement

(Footnote continued on following page)

(Petition at p. 18) Petitioners then seek to further confuse the issue by misstating Respondents' position regarding the relevancy of testimony about OSHA standards.[27]

Of course, there was no allegation in the pleadings below that Petitioners had violated OSHA standards, because this case was not brought to enforce OSHA standards.[28] Instead, as the Illinois supreme court held, this

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[26] *continued*

Of Facts, based upon the trial court record, which Respondent presented to the Supreme Court of Illinois. Because this Statement is based, in part, upon testimony before the Cook County Grand Jury, it is not submitted as having been established beyond a reasonable doubt. Rather, it is appended simply to rebut the assertions of Petitioners that they were in compliance with OSHA standards, and to illustrate, in graphic terms, the type of prosecution which is represented by the underlying case and some of the facts Respondent expects to prove if this case is allowed to be tried on its merits. The Illinois Court declined to grant Petitioners' Motion to Strike this testimony, thus leaving it as part of the Record on Appeal. (Opinion, Petition, p. 17a) Expositions of this and of other similar cases of workplace crimes may also be found in the following sources: *Getting Away With Murder: Federal OSHA Preemption Of State Criminal Prosecutions For Industrial Accidents*, 101 Harv. L. Rev. 535, 550 (1987); Warren, Rebecca, *The OSH Act and State Criminal Law: A Prosecutor's Brief*, Criminal Law Bulletin, May-June, 1989, Vol. 25 No. 3, Warren Gorham & Lamont, Inc., Boston, Mass. (pp. 234-256); and Report of House Committee on Government Operations, Getting Away With Murder In The Workplace: OSHA's Nonuse Of Criminal Penalties For Safety Violations, H.R. Rep. No. 1051, 100th Cong., 2nd Sess. 9 (1988).

[27] Petitioners erroneously characterize Respondents' position by stating that the Respondent successfully contended that "OSHA standards are simply irrelevant in this case." (Petition p. 17) This is not, nor has it ever been Respondents' position in this case. Rather, Respondents have taken the position that OSHA violations are *immaterial*, which is to say, they need not be alleged as a separate element of the state crime charged. Actually, as a practical matter, compliance or non-compliance may be highly relevant in determining the material element of *mens rea*.

[28] *Id.*

case was brought "to punish as a matter of retributive justice." (Opinion, Petition at p. 8a) To be sure, every state statute which touches at all upon an area where federal legislation is present has some incidental impact upon that area, but where that impact is neither direct, nor in conflict with the federal legislation, the incidental impact does not rise to the level of preemption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S.Ct. 615, 625, 78 L.Ed. 2d 443, 457 (1984); and compare, *Smith v. Western Electric Co.*, 643 S.W. 2d 10 (Mo. App., 1983).

In a number of ways, Congress has not only failed to indicate an intent to occupy the field of state criminal law, but has clearly indicated a contrary intent.

As already noted, the primary purpose of OSHA is the encouragement of improved working conditions, the promotion of the health and safety of workers, and the preservation of our precious human resources. (See, pps. 14-15, *supra.*)

Congress elected to accomplish these ends by enacting regulations and by imposing sanctions for the violations of those regulations. Moreover, even in the realm of regulation of the workplace, Congress did not intend to occupy *every* area. Thus, in the absence of a federal standard under 29 U.S.C. §655, even state regulatory laws are not preempted, since Congress did not intend to occupy the entire field of regulation. *Puffer's Hardware, Inc. v. Donovan*, 742 F. 2d 12, 16 (1st Cir. 1984); (and see also: 29 U.S.C. §667(a), which reserves to the state the right to assert its jurisdiction over *health and safety issues* for which no OSHA standards are in effect.)

Therefore, even in the area of direct regulation, Congress has indicated that it did not anticipate the complete preoccupation of the field by OSHA.

Petitioners' argument that Congress intended to occupy the "whole field" therefore is not even valid as it applies directly to health and safety issues themselves, and as this Court stated in *Hillsborough County v. Automated Medical Laboratories, Inc.*:

> Appellee's second argument for pre-emption of the whole field . . . is that an intent to pre-empt can be inferred from the dominant federal interest in this field. We are unpersuaded by this argument. Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of "importance" and hold that, for those at the top of the scale, federal regulation must be exclusive. 471 U.S. 707, 719, 105 S.Ct. 2371, 2378, 85 L.Ed. 2d 714, 725 (1985).

This is true with especial force in the instant area, where Congress has not only invited State participation and reserved regulatory authority to the States in the health and safety area itself,[29] but has explicitly stated its intention that all non-conflicting laws are to remain in effect,[30] and further, has failed to include provisions punishing substantive offenses, such as Murder, Aggravated Battery, and Reckless Conduct but instead has merely sought to punish, with misdemeanor penalties, *standard violations*.[31] In the instant matter, Petitioners have offered absolutely no solid indication that prosecutions such as this one will in any way obstruct or conflict with the congressional intention behind, or with the

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[29] 29 U.S.C. §667(a).

[30] 29 U.S.C. §653(b)(4).

[31] 29 U.S.C. §666(e).

enforcement of, the OSH Act. Instead, Petitioners engage in rank speculation and unsupported guesswork, using imaginary "worst case" scenarios about "what might possibly happen" in hypothetical situations. (See, generally, Petition at pp. 16-19, 21) Such hypotheticals do not have any valid relationship to the charges in the case at bar, and where, as here, there is no clearly established conflict between the enforcement of State law and the operation of the federal statute, this Court has repeatedly held that such conflicts out not be sought out. See, *Huron Portland Cement Co. v. City of Detroit, Michigan*, 362 U.S. 440, 446, 80 S.Ct. 813, 817-818, 4 L.Ed. 2d 852, 858-859 (1960); and *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3298-3299, 73 L.Ed. 2d 1042, 1053 (1982):

> . . . [P]re-emption should not be judged on the basis that the federal government has so completely occupied the field of safety, that state remedies are foreclosed, but on whether there is an *irreconcilable conflict* between federal and state standards, or whether the imposition of a state standard would frustrate the objectives of the federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S. Ct. 615, 626, 78 L. Ed. 2d 443, 458 (1984).

The principal faults of the Illinois appellate court in its opinion approving the preemption theory, an opinion which Petitioners' cite with approval, was its implicit acceptance of the theoretical and hypothetical conflicts raised by Petitioners and that Court's incorrect assignment of the burden of persuasion to the Respondent, rather than to Petitioners. (Appellate Opinion, Petition, pp. 19a, 23a,

24a)[32] Had that court not indulged in those fundamental errors in approach, its decision would have been different.

In fact, state prosecution of crimes in this area, under laws of general criminal application, can do nothing but give assistance to the Congressional purpose in enacting OSHA.

Stripped of its legalisms, Petitioners argument may be seen for what effects its adoption would portend; immunity for employers (including corporations) as a class, no matter how egregious, no matter how repugnant their abuse of their employees. How tragically ironic if an act, the primary purpose of which is the benefit of American workers, were twisted into a shield for unscrupulous, uncaring companies and executives to escape responsibility for acts which, if committed by any other person, would

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[32] *People v. Chicago Magnet Wire Corp.*, 157 Ill. App. 3d 797, 510 N.E.2d 1173, 110 Ill. Dec. 142 (1st Dist. 1987). This opinion, like that of the Supreme Court of Illinois in the same case, (*People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 534 N.E. 2d 962, 128 Ill.Dec. 517 (1989), restyled by Petitioners as *Frank Asta et al. v. State of Illinois*, in this Court) is contained in the appendix to the Petition For Certiorari filed by Petitioners. Page citations to both opinions are to the page(s) of that Appendix. The opinion of the Illinois appellate court, as correctly noted by the Wisconsin Court of Appeals, which declined to follow it, inappropriately assumed the existence of conflicts, which were neither established by Petitioners nor irreconcilable in nature and: "The Illinois (Appellate) Court never acknowledged or discussed the rule that an Act of Congress is presumed not to preempt state law, or that the burden of showing preemption is upon the person claiming it. Indeed, the court appears to have proceeded on the assumption that the State had the burden to show lack of preemption." *State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 425 N.W. 2d 21 (Wis. App. 1988). *Cornellier* was cited with approval by the Illinois supreme court in its reversal of the Illinois appellate court's *Magnet Wire* opinion. (See, Opinion, Petition p. 15a)

be punished as crimes. This cannot have been what Congress intended and there can be, therefore, no implied preemption in this case.

Seen in this way, the question is not a close one, and Respondent urges that certiorari accordingly be denied.

CONCLUSION

Respondent, the State of Illinois, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

STATEMENT OF FACTS FROM THE STATE'S BRIEF BEFORE THE SUPREME COURT OF ILLINOIS

STATEMENT OF FACTS [1]

Chicago Magnet Wire Corporation (hereinafter "CMW") is a subsidiary or held company of North American Phillips. The principal business done at CMW is the coating of wire with various substances and chemical compounds. The individuals charged are officers or high managerial agents of CMW. At all times pertinent to the charges, Anthony Jordan was President of CMW, (R. 1006) Kevin Keane was Plant Manager, (R. 1006-1007) Allan Simon was Plant Engineer, (R. 1007) Frank Asta was Maintenance Foreman, (R. 1007) and Gerald Colby occupied a number of positions, including those in control of engineering, maintenance, and quality control. (R. 1007)

The physical problems at CMW apparently began shortly after the plant's capacity was expanded in 1979-1980. At that time CMW installed sixteen new ovens and began to speed up its production. (R. 900) At one point production was up 700% over capacity, and the business was very profitable. (R. 1056) After this modification, plant conditions appear to have worsened.

The plant air quality was very poor. It exuded an offensive odor, and was very cloudy and smokey, so much

[1] In their Response to the People's Petition For Leave To Appeal (hereinafter "Response" and "Petition", respectively) Defendants criticized the People for allegedly failing to deal with the charged conduct. (Response p. 3) Although the People submit that this criticism is unjustified, due to the fact that this case has not yet been tried, this statement of facts deals with the conduct the conduct underlying the charges as seemingly invited by Defendants. The testimony cited is some of that taken before the Cook County Grand Jury, and is part of the Record On Appeal. Needless to say, the "facts" cited are only alleged at this point, since the People have not permitted to go to trial in this case, and they are not all inclusive. This Statement of Facts will, however, give this Honorable Court a good sample of what the People's evidence at trial would show.

so that vision was substantially impaired. (R. 1010) The plant was also extremely hot, the floor temperature ranging around 90 degrees in the winter and 120 degrees in the summer. (R. 976) On the catwalks, where workers were required to go, the situation was much worse. There temperatures climbed as high as 250 degrees to 300 degrees, (R. 977) well above the boiling point of water.

The plant contained eighty-six ovens which operated at between 800 degrees and 1,000 degrees (R. 978-979) Additionally, the plant contained extruder ovens which were used to coat the wire with polyvinyl chloride, and which overheated and smoked incessantly, (R. 979, 1047) and procedyn ovens which burned off the polyvinyl chloride and gave off a dense smoke. (R. 979)

At one point, every machine in the plant was unguarded, and when wire strands would break, the spools of wire would keep spinning, flinging wire fragments into employees' faces, heads, necks and chests. (R. 1068) The machines also sprayed a fine oil mist which covered everything and hung in festoons, making the work area very slippery and hazardous. (R. 1046) Aluminum and copper dust coated the floors, (R. 1046) and in this close-quartered atmosphere, pools of spent enamel were "all over the place." (R. 1032)

Alarms in the ovens were by-passed and Defendant Jordan forbade their repair since to do so would have decreased production. (R. 1020-1021) In some cases, such as that with one of the procedyn ovens, a machine was operated without all of its parts, even though the parts needed to repair it were lying right next to the machine, because Defendants did not want to stop production long enough to fix the oven. (R. 1035)

Despite the frequent fires at the CMW plant, flammable materials were stored on the catwalks to feed into the system, (R. 1030-1031) there were gas leaks, and the plant's electrical system was defective. (R. 1053)

Until 1982, the plant averaged between 1,000 and 1,100 employee injuries out of a total of 225 factory employees. (R. 1008)

Gary Olson, who was Safety Director at CMW between 1979-1983 (R. 1006) described CMW as a "sham" and a "travesty", (R. 1068) where most of the one hundred or so employees who were disabled by occupational diseases were fired, (R. 1043) where employees regularly "dropped over" due to the heat and fumes, (R. 1046), and where there was a constant flow of employees between CMW and the hospital. (R. 1046) Having ambulances report to CMW, Olson stated, "was not an unusual circumstance." (R. 1046)

Typical of the plight of the employees was that of Danny Vaughn, a CMW employee from 1979, until March 30, 1983, who worked as a "late man" in the maintenance department. (R. 975) Vaughn's duties at the plant included keeping the enamel floor machinery running. (R. 975) He described the factory as smokey and hazy. Breathing was difficult at the top of the plant, and his eyes watered, his nose ran, he had dizzy spells and nausea. (R. 976) Hot enamel frequently burned his skin, and resulted in scarring. (R. 976)[2]

Mr. Vaughn was required to work on the catwalks every night, (R. 980-981) where the temperature sometimes reached 300 degrees. (R. 977) While there, he had to clean the sheaves, shutters, and hoods with trichloroethylene, utilizing only cloth gloves, a paint brush and paper towels. (R. 981, 984) The trichloroethylene soaked through his gloves everytime, and would vaporize when it hit one of the hot objects, giving off a vapor which burned his eyes, made his nose run, and caused dizziness.

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[2] Of course, not everyone found the enamel burns painful. One employee, Reginald Bryson, got some hot enamel into his shoes, was in an extreme amount of pain and was trying to get his shoes off, while Defendant Kevin Keane, who was watching this incident, laughed at him. (R. 1004)

(R. 982)[3] Mr. Vaughn was not provided with a respirator (R. 983), rubber gloves, (R. 985) or aprons. In fact, the only safety equipment he was provided were shoes and glasses, and the glasses were not vapor proof. (R. 987) Most of the employees who worked cleaning up the enamel spills were not provided any protective equipment either, (R. 983) although they were compelled to clean up the enamel spills with a 50/50 mixture of xylol and Cresylic Acid, which they poured over mops and mopped the floor with. (R. 983)[4]

Vaughn testified that he was on the catwalks himself cleaning the sheaves, shutters and hoods three times per night, (R. 985) and sometimes was on the catwalks up to thirty times per night for other reasons. (R. 981) He stated that breathing on the catwalks was very difficult (R. 12) and that his face was only about twelve inches from those spots where the trichloroethylene compound he was using to do the cleaning was being turned into vapor. (R. 982) During Vaughn's four years at CMW, no fresh air was pumped into the plant, (R. 989) the hoods over the ovens would not pull the smoke away, (R. 989) and only some of the applicator machines had doors on them to keep the smoke inside the ovens. (R. 991)

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[3] Trichloroethylene is a fast soluble material much like ether, which can be absorbed through the skin or inhaled. (R. 1063) It is a central nervous system depressant and lung irritant. It can cause brain damage, kidney and liver problems, and has been associated with cardiovascular problems. When it comes into contact with high heat or hot metal it vaporizes, creating by-products which include phosgene gas, chloride gas, and hydrochloride acid. (R. 1063)

[4] Xylene, which was used at the plant, is a solution solvent absorbed through the skin and lungs. (R. 1063) It is very toxic, affects the eyes and mucus membranes, and can cause narcosis. (R. 1064) Cresol produces central nervous system disorders, chronic stomach and intestinal pain, and damage to the liver, kidneys and lungs. (R. 1064)

Mr. Vaughn, who became concerned about his trouble breathing, asked Defendant Frank Asta whether the chemicals in the plant were harmful, but was told that they would not hurt his breathing. (R. 993)

Nevertheless, on March 15, 1983, while attempting to repair one of the procedyn ovens which did not have all of its parts (R. 1035) and was exuding polyvinyl chloride, (R. 994) Danny Vaughn, who still had been provided no respirator, (R. 994) began to feel ill. After completing the job, and upon being called to do another, he became unsteady, saw "white dots" before his eyes, and noticed that his throat was sore and his eyes watering. (R. 994) He attempted to shake the condition by going outside to get some fresh air, but that only seemed to aggravate his symptoms. (R. 994-995) He decided to go to the hospital, but was informed that a taxicab would take at least 45 minutes, so he eventually drove himself there, despite the numbness in his legs. (R. 995-997)

After returning to work, Mr. Vaughn again became ill on March 30, 1983, while cleaning the shutters. He could not breathe. (R. 995) Again he went to the hospital, where, after undergoing some tests, it was determined that his lungs were filled with fluid. (R. 996) Danny Vaughn has not been able to work since that time. (R. 996) When he began working for Chicago Magnet Wire, Danny Vaughn was in perfect health. (R. 997) Now he has liver damage, bladder and respiratory problems, [neurosis] (sic?) of the liver, severe headaches and hepatitis, and is completely unable to work. (R. 996-997)

On at least one occasion, Traveler's Insurance Company, CMW Workers' Compensation carrier, was requested to do some testing. (R. 1011) When Defendant Jordan discovered that one of CMW's female employees had written to Traveler's he told CMW's Safety Director to "cut her tits off", and make sure she never was able to work at CMW again. (R. 1011) Jordan, in fact, maintained that there was nothing wrong with the plant's air, (R. 1012) and that masks would never be used because the air was

fine, (R. 1027) although he did repeatedly refuse to permit Traveler's permission to test. (R. 1012-1013) Moreover, Jordan refused to release to Traveler's results of some tests allegedly performed by Leon Kirschner, an industrial hygiene consultant. (R. 1012-1013) CMW's Safety Director never saw Kirschner perform such tests. (R. 1013) In fact, no testing was done at all until pressure forced one in June, 1983. (R. 1013) Evidently, the pressure came from the parent company and, typically, was caused by a concern over excessively high insurance premiums. (R. 1016-1019)

When Traveler's was finally permitted to do some testing, their conclusions were that the CMW plant was defective by reason of excessive heat, excessive sound, air pollution, and poor management. (R. 1019)

Defendants Jordan and Colby told employees that there was nothing in the plant that would hurt them, (R. 1021) and Jordan did not want employees to wear masks because if they did, the employees might think there was something wrong with the air. (R. 1027)[5] Once, when the manager of engineering himself passed out in the plant and injured his head on one of the ovens, Defendants Keane's suggestion to him was to "stay away from the ovens." (R. 1022)

Olson knew there was something very wrong with the air, and argued with Defendants Jordan and Simon about the problem. (R. 1023) He quoted OSHA standards to all of the Defendants, (R. 1023-1024) but they all "felt that we should get away with what we could get away with until we got caught and suffer the consequences however minor they would be." (R. 1024) Additionally, Defendant Keane amplified this position a bit, and stated that he didn't "give a fuck about the law" as it pertained to respirators. (R. 1027)

[5] Of course, the defendants occupied an air conditioned office.

When Olson met with Defendants Jordan, Keane and Colby to discuss the large number of workers who were becoming ill, Jordan ordered him to "stay the hell away from it" and to do what he was told or be fired. (R. 1028-1029) When Olson finally succeeded in getting a few respirators, he was at first not permitted to give them out, and then was precluded by Jordan from replacing the filters in those few respirators which he did manage to obtain. (R. 1019-1020)

When an air meter was finally obtained in the Spring of 1983, it "went off" in virtually every part of the CMW plant. (R. 1036)

Although OSHA did come in response to a complaint in July, 1983, the plant was not going through its normal operation because someone had been tipped off that they were coming. (R. 1040)

When doctors called the plant for information necessary to help employees who were their patients, they were not given the requested information. (R. 1042) Olson knew personally of one employee who was medically unable to work because of breathing problems incurred at CMW, whom Defendant Jordan fired. (R. 1043) Workers were berated into returning from sick leave. (R. 1043) Olson also knew of a guard who was fired because he made the mistake of giving a doctor, whose worker-patient was in the emergency room of a hospital with severe respiratory distress, some necessary treatment information concerning a chemical used at the plant. (R. 1043-1044)

Gloves were withheld from gas inspectors so that they could not ascend hot ladders to check for leaks, (R. 1041) and workers fired because they were too ill to work were denied worker's or unemployment benefits. (R. 1043) Despite explosion hazards, and constant fires, no evaluation plan was put into practice because to do so would mean a decrease in production. (R. 1033)

Doctor Mark Round, who examined or was familiar with the cases of all the victims, testified that the aluminum

dust present in the plant, in conjunction with the heat and trichloroethylene caused moderate to severe brain damage, and has been associated with Altzheimer's disease. Moreover, Dr. Round stated, polyvinyl chloride causes nervous disturbances and liver disorders, (R. 1068) copper dust ulcerates the lungs and causes skin and hair discoloration, (R. 1067) and methyl ethyl ketone, another solvent used in the plant, causes eye irritation, and narcosis. (R. 1069-1070) Additional chemicals present at CMW were isopropanol, urethane, methyl pyrrolidon, methyl pentane, ketone and naptha.

Tests for toxic chemicals were positive for all of the victims, and at least half of those chemicals used at the plant showed up in the typical worker's case. (R. 1073-1075) The victims suffered from conditions and illnesses including toxic dementia, solvent narcosis, toxic bronchitis, proteins and blood in the urine, impotence, painful burning and frequent urination, toxic hepatitis, and numbness in the extremities. (R. 1076-1077) It was Dr. Round's expert opinion that the conditions of the victims were caused by their exposure to the chemicals used at CMW. (R. 1077)

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IN THE
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On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF OF PETITIONERS

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Respondent concedes, as it must, that the issue presented by petitioners is an "important" one (Opp. 4, n.1) on which the state courts have reached conflicting results. Nevertheless, respondent insists that it should be permitted to impose the burden of a criminal prosecution upon petitioners before this Court decides whether such a prosecution is constitutionally permissible. None of the reasons proffered by respondent for denying the petition supports such a manifestly unjust result.

1. Respondent's primary argument is that certiorari should be denied because the factual issue of whether petitioners were "in compliance with OSHA standards" (Opp. 5) is yet unresolved. But at the same time, the State of Illinois concedes that, as far as its prosecution of petitioners is concerned, *petitioners' compliance with*

OSHA standards is legally irrelevant. Respondent's Opposition makes clear that, as the indictment indicated, petitioners' criminal liability under the unarticulated Illinois standards will be decided completely apart from the comprehensive federal regulatory framework. Opp. 5, n.2 (OSHA violations are "not material" to this prosecution). Respondent will not have the burden of proving that petitioners were in violation of OSHA as part of its affirmative case. Moreover, compliance with OSHA will not be a defense. Indeed, it is clear from the State's position that the prosecutors will object vigorously to any proposed jury instruction regarding OSHA compliance as a defense. Thus, there is no reason for this Court to await development of a "factual" question that the State concedes to be wholly irrelevant; this case is appropriate for review now.[1]

2. Respondent makes some effort to distinguish the lower court opinions which conflict with the decision of the Illinois Supreme Court. Respondent asserts that "most of the decisions" are "not of the type to create a clear difference of opinion." (Opp. 11.) Respondent's ar-

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[1] Despite respondent's repeated assertions that "undeveloped facts" prevent this case from being appropriate for review at this time, respondent does not even include a Statement of Facts in its brief. The only "facts" are relegated to an Appendix to respondent's brief, in an obvious attempt to circumvent this Court's rules concerning page limitations. Moreover, the Appendix was reproduced verbatim from the Statement of Facts contained in respondent's brief in the Illinois Supreme Court. It is based on grand jury testimony which was *not part of the record on appeal.* Petitioners moved to strike it on that ground, but the Illinois Supreme Court never ruled on petitioners' motion, most likely because the specific factual discussion is wholly irrelevant to a proper disposition of the preemption issue.

In any event, for a more objective and accurate summary of the facts underlying this case, petitioners refer the Court to the brief filed by *amicus curiae* the Synthetic Organic Chemical Manufacturers Association in support of the petition.

gument in this regard essentially involves a "domino theory" of legal reasoning. Respondent suggests that if the conflicting decisions had been rendered *after* the decision of the Illinois Supreme Court (rather than after the contrary decision of the Appellate Court of Illinois), the outcomes would have been different because of the "heavy reliance" those courts placed upon the appellate court's decision. For example, with respect to the conflicting Texas decision, respondent states that the Texas court "bottomed its opinion upon the Illinois appellate court's subsequently reversed opinion in the instant case, so its precedential value is questionable." Opp. 7. Similarly, with respect to a conflicting Colorado precedent, the respondent states that "it appears [the Colorado case] would have been decided differently if the Colorado judge had waited for the opinion [below]." Opp. 8.

There is no basis for these assertions. Neither the Texas nor the Colorado court was bound by the Illinois appellate court's decision. Instead, they adopted its reasoning because they found it to be a persuasive interpretation of Congress' intent in enacting the OSH Act. Just as the Wisconsin appellate court was unpersuaded to follow the Illinois appellate court's opinion in this case, *see* Opp. 27, n.32, the courts in Texas and Colorado are not likely to abandon their holdings based on the legal reasoning employed by the court below. They represent the law of Texas and Colorado, and not of Illinois. Thus, the subsequent reversal by the Illinois Supreme Court in no way diminishes the real conflict in the decisions in the various states and does nothing to eliminate the unfairness inherent in a situation in which residents in Texas, Colorado and New York cannot be prosecuted for precisely the same conduct for which petitioners have been indicted and will stand trial under the holding below. That conflict in decisions on an issue as

"important" as the one presented by petitioners requires resolution by this Court.[2]

3. Respondent also argues that certiorari should be denied because the court below was correct on the merits. Its fundamental argument is that "the prosecution of criminal offenses under state criminal laws of general application cannot be preempted by OSHA because such prosecutions do not equate with the enforcement of health and safety 'standards' . . . ." Opp. 18. But this type of argument already has been rejected by this Court. "[I]t is well settled that the general applicability of a state cause of action is not sufficient to exempt it from preemption." *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 300 (1977). Moreover, "it is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern [in preemption analysis]." *Amalgamated Ass'n of Street, Electric & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971); see Pet. 12-13 ("this Court consistently has rejected" the argument that traditional preemption doctrine does not apply to " 'general' criminal laws").

The plain language of the OSH Act makes clear that on an "issue with respect to which a Federal standard has been promulgated," state action is permitted only if it is pursuant to a state plan that has been approved by the Secretary of Labor. 29 U.S.C. § 667(b); *see* Pet. 14. That implementing and administering such a plan may be difficult or expensive, as respondent complains (Opp. 9), does not bear upon Congress' intent in this regard.

Focusing on the real impact of the state's proposed conduct, there is no question that criminal prosecutions

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[2] The decision of the Michigan Court of Appeals in *People v. Hegedus*, 169 Mich. App. 62, 425 N.W.2d 729 (1988), was reversed by the Michigan Supreme Court on July 3, 1989 (No. 83601). Although the decision eliminates the conflict between Michigan and Illinois it in no way detracts from the conflict that otherwise exists with the other state courts.

based on workplace conditions will have the effect of setting "standards," [3] which is a matter explicitly committed to the exclusive authority of OSHA. The central threat that such a prosecution poses (both to employers and to the comprehensive scheme of OSHA regulation) lies in the fact that such "standards" will be developed and articulated only on an *ad hoc* basis. Indeed, allowing such standards to be set by *post hoc* criminal prosecution—rather than by federal regulation based on available scientific evidence—invites the very localized and politicized decisionmaking that Congress, in enacting OSHA, sought to eliminate. (Pet. 16-18.) [4]

Respondent's suggestion that "lack of serious criminal penalties" evidences congressional intent not to preempt state criminal prosecutions for OSHA-regulated conduct also fails, because it directly contradicts the legislative history of the OSH Act. As explained in the petition, Congress carefully considered and debated the question of appropriate penalties for conduct prohibited by the OSH Act and concluded that criminal penalties would be provided only for those willful violations that result in death. (Pet. 5 n.2.) Thus, the lack of other criminal penalties was based on Congress' determination that the purposes of the Act would be best achieved through " 'preventative rather than punitive means'." *Id.* at 4.

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[3] The indictment itself is based on the theory of a breach of the "duty" to provide a safe workplace. (Pet. 15.) The question which will be left entirely to the discretion of the jury in this case—rather than to the Department of Labor under OSHA—is what "standard of care" is imposed under that "duty."

[4] As a secondary position, respondent states that the problem of imposing workplace standards through criminal prosecutions is not particularly troublesome because Congress, in enacting OSHA, sought only to impose "minimum" standards. (Opp. 16-17.) That is a demonstrably incorrect statement of Congress' intent as the language, structure and legislative history of the OSH Act make clear. (Pet. 3-7, 13-18.) The only support that respondent cites for this assertion is the decision of the Illinois Supreme Court in this case and one other state court case. (Opp. 16.)

4. At bottom, the State's extreme view of OSHA preemption, *viz.*, that petitioners may be imprisoned or fined under state "standards" for conditions in the workplace in compliance with comprehensive OSHA standards, demands review by this Court.[5] (Pet. 10-11.) The State's argument that federal standards are irrelevant, which was adopted by the Illinois Supreme Court, represents a serious misapplication of this Court's preemption doctrine and conflicts with a number of other state court decisions on this issue. (Pet. 13-15, 18-22.) Moreover, such a flagrant disregard of federal authority threatens to eliminate the uniformity and balance that Congress deemed to be essential to maintaining safe and uniform workplace conditions.[6] (Pet. 15-18.) Its effects are and will continue to be felt not only by defendants such as

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[5] Respondent suggests that petitioners are seeking to use OSHA as a shield to immunize employers for all actions that occur in the workplace. In so doing, respondent grossly mischaracterizes petitioners' argument. Petitioners contend simply that OSHA preempts state criminal prosecutions for matters actually regulated by OSHA. If the conduct or conditions at issue are not regulated by OSHA, then prosecution is not preempted. Petitioners have never contended, as respondent suggests, that the OSH Act "expressly precludes all state action in the workplace." (Opp. 20.)

There is also no basis for the State's belated assertion that many of the charges against petitioners may involve unregulated substances. The State has never made that argument previously and the State's assertion is supported by absolutely nothing in the record. *See* Opp. 12 (citing nothing to support this claim). This is clearly a desperate effort to avoid having the case reviewed by this Court on the present record, which shows that petitioners have complied with OSHA. In any event this issue is a complete red herring because nothing in any decision by this Court concerning the questions presented by petitioners would preclude the State from seeking to reindict petitioners if it believes it can convince a grand jury that substances not regulated by OSHA in fact caused injuries to employees.

[6] *Amici curiae*, the Chamber of Commerce of the United States, *et al.*, describe the "regulatory chaos" portended by the decision below in their brief filed in support of the petition. (Br. 5.)

petitioners but by the Department of Labor, as well. In sum, there is no reason to delay a decision by this Court on this concededly important and recurring issue and, just as important, notions of fundamental fairness to the individual defendants argue forcefully for immediate review.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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This brief *amicus curiae* is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

I. INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States is a federation consisting of several thousand state and local

Chambers of Commerce and trade and professional associations as well as more than 180,000 corporations, partnerships, and proprietors who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member employers in important labor relations and employment law matters before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities. The regulation of safety and health matters at business establishments has become of increasing concern in recent years, and virtually all of the Chamber's members are directly affected by this increasingly important facet of regulatory law.

The National Association of Manufacturers of the United States is a voluntary business association of approximately 13,500 companies and subsidiaries. NAM's member companies employ 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. The NAM also is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

The Chicago Association of Commerce and Industry has approximately 4,100 members in the eight county Chicago Metropolitan Area. While this Association represents the business community in the Chicago area with respect to a wide variety of matters, its principal current concern is economic development. In its efforts actively to encourage employers to stimulate job retention and attraction to increase their business activity in the Greater Chicago Metropolitan Area, the Association regularly represents its members before legislative and administrative bodies in an effort to keep regulation from becoming

oppressive and in an effort to make it simple and understandable wherever possible.

The Illinois Construction Industry Committee is composed of eleven construction industry trade associations representing major general contractors and subcontractors in Illinois engaged in commercial industry, utility, road and bridge, and public buildings construction. The Committee represents over a thousand member employers which collectively employ the overwhelming majority of construction workers in nonresidential construction in Illinois. Its members are deeply concerned with health and safety matters, and the Committee attempts to keep its members advised in an understandable way of the requirements of federal, state, and local regulation of workplace safety and health.

The Illinois Manufacturers' Association, representing 5,400 industrial firms in Illinois, was founded in 1893. While the I.M.A. is the oldest and largest state association of manufacturers, most of its members are small, with nearly 80% of its participating firms employing fewer than 100 persons. The I.M.A. actively represents manufacturers before the Illinois General Assembly, before administrative agencies, and the courts on matters of concern to industry. Of particular concern to manufacturers are laws and regulations governing employee health and safety.

The Illinois Retail Merchants Association includes local chambers of commerce, retail committees, and shopping center organizations as well as retailers in all merchandise lines. Its membership includes over 25,000 Illinois retailers accounting for approximately 85% of all retail sales in Illinois. It has long been concerned with labor and employment matters and represents its members with respect to proposed legislation and regulation with respect to health and safety issues.

The Illinois Self-Insurers Association includes several hundred major Illinois employers who self-insure their workers' compensation liability. They are engaged in a wide diversity of business activity, and together they employ over 400,000 persons in the state of Illinois. Many members have nationwide operations and thus employ a substantial number of employees in other states as well. Because this Association concerns itself particularly with workplace injuries, it has a deep and abiding interest in regulation of safety and health matters.

The Management Association of Illinois is comprised of approximately 2,000 Illinois employers and thirty Illinois employer associations. Its purpose is to offer employers methods of improving their organizational effectiveness by providing superior value training, human resources consulting, information, benefit programs, and legislative representation to ensure improved labor and employee relations laws and regulations.

National Electrical Manufacturers Association is the major national trade association for manufacturers of products which generate, transmit, and distribute electrical energy. NEMA has approximately 600 member companies located throughout the United States. Its Magnet Wire Section includes 13 members whose total annual sales account for over 90% of the magnet wire sold in the United States.

All of the Associations joining in this brief recognize that the safety and health of employees is a vitally important matter. In today's complex and highly technical world, the development and enforcement of appropriate safety standards is no simple task. OSHA has been charged with that task. Its complexity may be demonstrated by the fact that the preamble to the final rules and regulations governing only workplace air contaminants, which issued January 19, 1989, runs to 587 pages! OSHA

is vigorously pursuing the development and enforcement of all of its multitudinous and complex standards. In fiscal year 1988, according to the November 11, 1988, OSHA Inspection Report issued by the U. S. Department of Labor, 58,354 inspections were conducted, 154,884 violations were found, and penalties totalling $45,004,519 were imposed. American industry accepts the fact that federal safety laws must be, and are being, actively enforced.

But the business community is deeply concerned about the potential regulatory chaos which is portended by the decision of the Illinois Supreme Court in this case. The import of this decision is that individual States Attorneys in the 102 counties in Illinois and, foreseeably, in thousands of counties throughout the United States will have the authority, each in his or her own way, to seek to regulate workplace safety. They will be permitted to present to courts and juries their own doubtlessly diverse and potentially conflicting standards for what constitutes a safe workplace. They will then be authorized to prosecute, as criminals, the officers and managers of employers for having failed to meet these unknown, unknowable, and potentially conflicting sets of workplace safety standards.

Amici strongly believe that Congress intended, when it enacted the OSH Act, that workplace safety and health should be a federal concern and that its complexity in today's world demanded centralized, uniform, federal regulation. The employers represented by the *amici* are devastated by the prospect of being subject, in addition to the comprehensive federal regulations, to criminal prosecution on workplace safety matters by scores of States Attorneys across the nation, inexpert in complex safety issues, operating under no uniform standard, charging about like loose cannons on the deck of a tossing ship.

Because of these concerns, the named employer associations urge this Court to grant the Petition for a Writ of Certiorari herein.

REASONS FOR GRANTING THE PETITION

A. It Is Important for this Court to Clarify Whether the Doctrine of Preemption, as Applied to OSHA, Requires Nationally Uniform Workplace Safety Standards

1. The Act and the Regulations Issued Under It Clearly Delineate Its Intended Preemptive Scope

In the Occupational Safety and Health Act, Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards for all businesses affecting interstate commerce (29 U.S.C. §655[b][5]). Employers and employees must comply with those standards (29 U.S.C. §654). The Secretary of Labor is authorized to conduct investigations, conduct on-site inspections, and institute enforcement proceedings (29 U.S.C. §§657, 658, 659, 662). The statute provides for civil and criminal penalties (29 U.S.C. §666).

The statute also addresses the extent to which individual states may regulate safety in the workplace. Sections 18(a) and (b) of the OSH Act (29 U.S.C. §667[a] and [b]) allow for state agency regulation over areas where OSHA has set no federal standards. It also allows for state plans regulating areas as to which federal standards have been set, but requires that any such plan be subject to approval by the Secretary of Labor. Illinois once submitted, but subsequently withdrew, a State plan. It had none at any time relevant to this proceeding.

The OSHA regulations, 29 C.F.R. §1901.2, state:

> *Section 18(a)* of the Act is read as preventing any State agency or court from asserting jurisdiction over any occupational safety or health issue with respect to which a Federal Standard has been issued under***the Act.

2. In This Case, Illinois Has Embarked on a Course of Local Criminal Prosecution of the Very Type of Workplace Safety Matters which the OSHA Act Entrusted to Federal Regulation

Petitioners here are five individual officers and agents of Chicago Magnet Wire Corporation (CMW) and the Corporation itself. CMW is an Illinois based manufacturer of coated wire. Petitioners were indicted by a Cook County, Illinois, Grand Jury, having been charged with multiple counts of aggravated battery and reckless conduct under Illinois criminal law. (Ill. Rev. Stat. ch. 38, §12-4[a] and [c] and §12-5.) The individual petitioners also were charged with conspiracy to commit aggravated battery, again under the general criminal laws of Illinois. (Ill. Rev. Stat. ch. 38, §8-2[a].)

The indictments alleged that certain CMW employees sustained injuries due to exposure of the employees to certain substances at the workplace because of the alleged failure of the defendants to provide necessary safety equipment and health monitoring systems, and the maintenance, by the defendants, of dangerous working conditions. The indictments charge defendants with acts constituting a violation of the defendants' duty to provide safe workplaces for their employees.

Petitioners moved to dismiss these indictments on the ground that OSHA preempted any state action because all of the conduct and conditions were regulated by the federal Occupational Safety and Health Act and

because petitioners were in compliance with OSHA regulations. Petitioners' contention that it was in compliance with OSHA regulations has not been contested.

The trial court (the Circuit Court of Cook County) and the Illinois Appellate Court held that the indictments should be dismissed on this preemption ground. The Supreme Court of Illinois has now held to the contrary. It is that decision of which petitioners here seek review.

3. The Illinois Supreme Court Decision Threatens to Destroy the Federally Uniform Safety Standards which OSHA Was Intended to Provide

Amici read the Illinois Supreme Court's decision to say that workplace standards, in the view of the Illinois Supreme Court, need not be uniform. That Court did not read Section 18(a) as being fully preemptive, and said instead:

> We judge that the purpose underlying section 18 was to ensure that OSHA would create a nationwide *floor* of effective safety and health standards and provide for the enforcement of those standards. (Emphasis supplied.)[1]

The Illinois Supreme Court would thus entrust a large area of enforcement to state criminal prosecutions, apparently unconcerned that to do so will leave the determination of regulatory safety standards in the hands of local courts and juries. The Court said:

> While additional sanctions imposed through State criminal law enforcement for conduct also governed

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1. Pet. App. A, p. 10a. Since the Illinois Supreme Court and Appellate Court decisions are included in full in the appendices to the Petition for Certiorari filed with this Court in this proceeding, we will identify quotations from those opinions by references to "Pet. App. ___, p. ___."

> by OSHA standards may incidentally serve as a regulation for workplace safety, there is nothing in OSHA or its legislative history to indicate that Congress intended to preempt the enforcement of state criminal laws simply because of its *incidental regulatory effect*. (Emphasis supplied.)[2]

In response to defendants' argument that to permit such potentially diverse and conflicting locally determined standards would defeat the preemptive intent of OSHA, the Illinois Court said:

> . . . [T]he charges here are based on the defendants' alleged willful failure to remove workplace hazards which create a substantial probability that they will cause injuries to the employees. *Thus employers are not left without guidance as to what standard of care they must meet*. (Emphasis supplied.)[3]

The Court did not discuss *how* the employer is to receive guidance as to what each local court may determine, *post hoc*, case by case, an appropriate standard of safety may be.

Then, ignoring that defendants here had asserted, without contest, that they were in compliance with the federal OSHA standards, and that the Cook County States Attorney had nevertheless proceeded with the instant indictments, the Court went on:

> Too, in practical terms, if a defendant were in compliance with OSHA standards, it is unlikely that the state would bring prosecutive action.[4]

Nowhere in the opinion, however, does the Illinois Supreme Court ever confront directly the crucial threat to federal preemption and to uniform federal safety law enforcement which will be presented if the courts in

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2. Pet. App. A, p. 11a.
3. Pet. App. A, p. 15a.
4. Pet. App. A, p. 15a.

Illinois (and presumably in other states), could each determine on a case by case basis what safety measures are adequate (and inadequate) and thus to devise non-uniform parameters for the "standard of care they [employers] must meet." Each time a county prosecutor seeks indictments under such remotely relevant crimes as "aggravated battery," but, as here, really alleging inadequate safety measures, the prosecutor will be obliged to persuade a court and jury to the prosecutor's views as to what the proper safety measures should have been, but were not. This leaves the determination of safety standards to case by case, jury by jury, county by county determination. No employer will know, in advance, what is expected, in the view of the county prosecutor, in the way of safety standards. The hapless employer will be left to discover that only after the jury has found the employer guilty or not guilty of a serious crime.

Amici urge that it is vitally important that it be determined whether established OSHA standards are, because of preemption, the only applicable standards which can be issued and enforced except when either no federal standard has issued or when state standards are issued under a State Plan approved by the Secretary of Labor.

Any employer should be able to rely upon compliance with uniform, federally established or approved standards and be protected by Article VI of the United States Constitution and the preemption doctrine which has developed thereunder. This Court should carefully scrutinize the Supreme Court of Illinois' holding, instead, that OSHA standards are merely a "floor" and that every county States Attorney is free to argue for such higher standard as he may choose. The Court should look long and hard at the Illinois Court's view that an employer's failure to meet every such locally advocated *post hoc* standard should put employers and their managers in

jeopardy of conviction of felonies such as "aggravated battery" and "reckless conduct".

We respectfully submit that this issue is of vital importance to all of the thousands of employers represented by *amici* and to their colleagues in the business community. We further respectfully submit that it is an issue of vital importance to judicial administration.

4. Federal Preemption Does Not Permit Local Regulation Even By Different Procedures if It Is Aimed at the Same Conduct as That Regulated by the Preemptive Federal Law

The decisions of this Court stand for the proposition that if certain *conduct* is regulated under a "comprehensive legal system in the hands of an expert administrative body,"[5] then the regulation of that *conduct* is indeed exclusively the province of the federal government, and that states may not invade that sphere no matter by what means or in what forum the state intrusion occurs. As this Court has said:

> It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.[6]

This Court has also said, in its discussion of preemption in another lead case:

> We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the *nature of the activities which the States now sought to*

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5. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971).

6. *Id.* at 292.

> *regulate, rather than on the method of regulations adopted.* (Emphasis supplied.)[7]

The Illinois Supreme Court decision here flies in the face of this and other decisions in which this Court has defined and refined the preemption doctrine. The conduct regulated by OSHA through the establishment of standards is the very same conduct which the States Attorney here wants to regulate by criminal trials. *Amici* view the decision of the Illinois Supreme Court which permits such local regulation of federally regulated conduct as a form of New Federalism run amok. But *amici*, most particularly, submit that the question of whether OSHA standards must be applied uniformly throughout the nation is one of vital national importance and presents an issue surely worthy of this Court's review.

B. The Question of Whether the States Are Free Individually to Determine Criminal Penalties for Workplace Safety Violations Is Also an Issue Presented Here and as to Which a Writ of Certiorari Should Be Granted

The Illinois Supreme Court's decision repeatedly lauds what it regards as the salutary imposition by the state of severe criminal remedies for failure of an employer to meet safety goals. The Illinois Court said:

> State criminal law can provide a valuable and forceful supplement [to OSHA regulation] to insure that workers are more adequately protected and that particularly egregious conduct receives appropriate punishment.[8]

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7. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 at 243 (1959).

8. Pet. App. A, pp. 14a-15a.

Amici do not understand the federal preemption doctrine to permit such local supplementation of a federal enforcement program. Differing penalties and differing remedies are, as amici interpret this Court's decisions, an inherent threat to federal preemption. So, for that matter, are a multiplicity of tribunals.

In *Garner v. Teamsters Union*, 346 U.S. 485 (1953), this Court considered the contention that state and federal authorities might supplement each other and that a private injunction to restrain damage to an employer's business might supplement the remedies for improper picketing under the federal Labor Management Relations Act. The Court rejected that contention, saying:

> It does not follow that the state and federal authorities may supplement each other in cases of this type. [W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent.

Id. at 498.

And at 490, the Court said:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order . . . *A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.* (Emphasis supplied.)

Id. at 490.

More recently, in *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282 (1986), the state of Wisconsin had sought to enforce a statute providing for debarment from state business employers guilty of multiple violations of

the National Labor Relations Act. This Court held that statute to violate the doctrine of preemption, referring to its earlier decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Pointing out that to have sustained the Wisconsin law might have invited similar but perhaps differing laws in other states, the Court went on to say:

> Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the "integrated scheme of regulation" created by Congress.

Id. at 288.

Here too, each separate county prosecution will incrementally diminish OSHA's control over enforcement of the OSH Act and thus further detract from that Act's integrated program of regulation of workplace safety.

Based on these and other decisions of this Court, *amici* urge that the Illinois court's sanctioning of local county prosecutions to supplement what the Illinois Court views as insufficiently punitive federal OSHA enforcement simply does not square with established preemption precedent.

It is not as if Congress had not considered carefully, when it enacted OSHA, what the enforcement scheme ought to be. The legislative history of the Occupational Safety and Health Act is replete with evidence of Congress' careful and deliberate choice of what it concluded were appropriate remedial measures. The first House Bill which marked the starting point for the development of the OSH Act proposed enforcement almost entirely by criminal means.[9] Several other bills included a variety of criminal and civil penalties, but all of these bills were

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9. H.R. 1179, 89th Congress, 1st Sess., 111 Cong. Rec. 88 (1965).

eventually rejected in favor of the legislation offered by Congressmen Steiger and Daniels, which retained essentially a civil penalty structure, but included, as modified in Conference, criminal provisions for willful standard violations which cause employee death.[10]

Particularly in light of this legislative history of OSHA's enforcement provisions, the Illinois Court's decision in the instant case should, we submit, be reviewed by this Court. That Illinois decision proclaims the legitimacy of, and indeed lauds, the imposition by a state (which does not have a federally approved State plan)[11] of a remedial scheme at variance with the carefully considered one specified in a federal law of national application. Such a decision, we submit, warrants careful scrutiny by this Court in light of its body of precedent dealing with the pre-emptive scope of the remedial provisions of federal regulatory laws.

C. The Proper Interpretation of the Savings Clause Contained in OSHA's Section 4(b)(4) Is Also a Matter Well Worth the Attention of this Court

In holding that county prosecutors were free to pursue charges of unsafe work places under state criminal laws prohibiting battery and reckless conduct, the Illinois Supreme Court relied in part on Section 4(b)(4) of OSHA. (29 U.S.C. §653[b][4].)

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10. This history of the development of the law is carefully and accurately described in Levin, *Crimes Against Employees: Substantive Criminal Sanctions Under the Occupational Safety and Health Act*, 14 Am. Crim. L. Rev. 717 (1977).

11. Some approved State plans, consistent with the federal laws, apply criminal penalties for willful violations which result in employee death. Ariz. Rev. Stat. Ann. §23-418; P.R. Laws Ann. tit. 29, ch. 16, §361x; N.C. Gen. Stat. §95-139.

The Illinois Appellate Court had rejected the contention that this section permitted criminal prosecutions of the type brought here, saying:

> The Courts which have interpreted Section 653(b)(4) have consistently found that the purpose of the section was to preserve the existing private rights of injured employees relative to workmen's compensation, state tort law and other common law remedies in favor of employees. (Pet. App. B, pp. 22a-23a.)

Amici contend that both the plain language of the Section and the well-established rule of *ejusdem generis*[12] require that this Section be construed to exempt from preemption only laws of the same type as those mentioned – i.e., the body of statutory or common law relating to compensation of employees for employment related injuries, diseases, or death. The section does *not* state that criminal prosecution of workplace safety regulations is to be exempt from preemption. Such criminal prosecutions necessitating local, rather than federal, determination of workplace safety standards are totally different, in both procedure and substance, from civil proceedings for compensation for employment related disabilities requiring no determinations potentially conflicting with OSHA workplace safety standards.

This is not a situation in which there was a preexisting body of state law and a federal law with legislative history plainly expressing an intent to leave that body of state law operative, as in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 254 (1984). There is no body of Illinois criminal

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12. That rule is clearly recognized in Illinois. *People v. McBrien*, 144 Ill. App. 3d 489, 494-495, 494 N.E.2d 732 (4th Dist. 1986).

law precedent in which workplace safety standards have been delineated and enforced. The States Attorney seeks to make such law in the face of a set of federally preemptive specific workplace safety standards, procedures for enforcing those standards, and federally prescribed remedies for failures to meet those standards. Similar savings clauses in other federal regulatory laws have been construed to apply only when the "breaches of duty alleged under the [State] common law claims are markedly different from the [federal] statutory claims."[13]

Here the savings clause *was* intended to preserve claims for workers' compensation and other rights or claims markedly different from those arising out of breaches of workplace safety standards. And indeed workers' compensation and similar claims *are* markedly different from the development and enforcement of workplace safety standards. But criminal prosecution based on allegedly unsafe working conditions are *not* different from the matters regulated by the OSHA statute.

This limited savings clause should not be construed to "save" local regulation of workplace safety, and thus destroy OSHA's clearly intended uniform, federally controlled safety standards and enforcement measures. The Illinois Court's sweeping construction of an intended narrow exception to OSHA's preemptive effect should, *amici* respectfully submit, be given the most careful review by this Court.

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13. *Bruss Co. v. Allnet Communications Services, Inc.*, 606 F. Supp. 401 (N.D. Ill. 1985); *see also City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

D. Granting Certiorari Here Can Halt the Confusion Arising Out of Increasingly Diverse State Court Interpretations of OSHA's Preemptive Scope

Several State courts have held that OSHA preempts criminal prosecutions based on workplace conditions.[14] One Federal District Court has ruled similarly.[15] One state appellate court has come to a contrary conclusion.[16] These and other inconsistencies in state court rulings are described in some detail in Petitioner's brief, pp. 15-21. We will not repeat that discussion here.

But it is plain that confusion both for the business community and for judicial administration is already a problem, and will grow worse if a halt is not called to what threatens to be a proliferation of such state court litigation, leading to further inconsistent interpretations of the preemptive effect of OSHA. This is a further reason why it is important for this Court to accept this case for review.

Of at least equal importance to *amici* is the fact that ever increasing numbers of local prosecutions under state criminal laws are threatening and harassing the managers

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14. *People v. Hegedus*, 169 Mich. App. 62, 425 N.W.2d 729, *appeal pending*, 431 Mich. 870, 429 N.W.2d 593 (1988); *Sabine Consolidated, Inc. v. Texas*, 756 S.W.2d 865 (Tex. Ct. App. 1988).

15. *People v. Kelran Construction, Inc.*, 13 O.S.H. Cas. (BNA) 1898 (Colo., Oct. 6, 1988).

16. *State ex rel. Cornellier v. Black*, 144 Wis.2d 745, 425 N.W.2d 21, *appeal denied*, No. 87-1120-W (Wis. Aug. 23, 1988).

and officers of employers. In Los Angeles alone, there have been eighteen such prosecutions.[17]

While a growing amount of lower court litigation can sometimes cut against a need for certiorari, the converse is true here. This is not run-of-the-mill business litigation. Constitutional rights are at stake. These are criminal prosecutions in which business managers who are attempting to comply with OSHA regulations are now being charged with serious crimes by prosecutors who seemingly pay no heed to the complexities of expert standard setting. Instead, they rush in with broadside charges of battery and other crimes which Congress never intended to be a vehicle for workplace safety regulation.

If, as *amici* urge, all of these local prosecutions are constitutionally beyond the reach of local courts because of preemption, that should be made known by an early decision of this Court. Business persons should not have to be branded as criminals and have their freedom and reputations threatened if these prosecutions are unwarranted and unconstitutional under the Sixth Amendment.

For these reasons, too, certiorari should be granted.

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17. House Comm. on Government Operations, Getting Away with Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations, H.R. Rep. No. 1051, 100th Cong., 2d Sess. 9 (1988).

CONCLUSION

For the reasons set forth above, all of the employer associations who have joined in this amicus brief respectfully request this Court to grant the Petition for Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANK ASTA, *et al.*,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

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BRIEF AMICUS CURIAE OF THE SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Occupational Safety and Health Act of 1970 preempts state criminal prosecutions based on conduct or conditions regulated by the Act.

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BRIEF AMICUS CURIAE OF THE SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Synthetic Organic Chemical Manufacturers Association ("SOCMA") submits this brief, as *amicus curiae* pursuant to Sup. Ct. Rule 36.1, in support of the petition for a writ of certiorari.[1] The decision below, reported at 534 N.E.2d 962 (Ill. 1989), was attached to the petition.

[1] The parties have consented to the filing of this brief *amicus curiae*. The letters giving consent were filed with the Court separately.

STATEMENT OF THE INTEREST OF AMICUS CURIAE

A. SOCMA and Its Members

SOCMA is a non-profit trade association of approximately 170 firms engaged in the manufacture of synthetic organic chemicals. SOCMA's member firms produce over 5,000 distinct organic chemicals, primarily intermediate and finished chemicals used in industrial applications. Over 60 percent of SOCMA's member firms are considered small businesses with annual synthetic organic chemical sales below $50 million. SOCMA's members have several hundred workplaces, some large, some small, all of which have employees with responsibilities for occupational safety and health.

SOCMA has a strong and abiding interest in the development of workplace safety and health standards. SOCMA has participated in rulemaking, enforcement, and priority setting of the Occupational Safety and Health Administration ("OSHA") since its inception in 1970, and has sought an OSHA program that is scientifically sound, protective of employee safety and health, and feasible for employers. SOCMA has kept its membership informed of significant OSHA developments and has sponsored a variety of seminars and informal workshops to facilitate member compliance with the Occupational Safety and Health Act ("the OSH Act"), 29 U.S.C. § 651 *et seq.*, and OSHA standards.

SOCMA's members are subject to extensive workplace safety and health regulation under the OSH Act. SOCMA's members operate facilities where employees are inevitably exposed to chemicals subject to regulations by OSHA. Those facilities are designed, operated, and from time to time modified, so as to comply with OSHA standards. In the decision below, the Illinois Supreme Court stated that "if a defendant were in compliance with OSHA standards it is unlikely that the State would bring prosecutive action." 534 N.E.2d at 969. SOCMA's members'

concerns are not allayed. The opinion elsewhere makes clear that such compliance would not be a defense, and SOCMA's own investigation of the facts[2] shows that the employer's allegedly criminal conduct was in fact in compliance with such standards.

SOCMA's members thus are concerned that application of general state criminal laws to employers for allegedly hazardous workplace conditions would subject employers to the whims of prosecutors, regardless of diligence in complying with OSHA standards. Those laws, unlike OSHA standards, do not provide clear standards based on scientific evidence respecting health effects and feasibility.[3] Nor do such prosecutions reflect the procedures mandated by the OSH Act if a state desires to assume authority to address occupational safety and health matters. Because employers base business decisions on the regulations affecting their processes, such uncertainties could wreak havoc on industry. Indeed, because there is no objective basis to guide employer conduct, such prosecutions raise the issue whether application of general state criminal laws to employers comports with due process notice requirements.

B. The Factual Context of the Indictments

The prosecution below was commenced in a politically-charged climate of poor labor-management relations. Chicago Magnet Wire Corp. ("the Company") frequently was inspected by OSHA and had a good compliance record with OSHA standards. Even analysis conducted

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[2] Since the case comes up on pretrial dismissal of the indictments, not all of these facts appear in the record.

[3] For example, the indictments below charged aggravated battery, reckless conduct and conspiracy under general state criminal law for exposing employees to "poisonous and stupifying substances" and for violation of the "duty to provide . . . a safe workplace," but are silent, as are the criminal statutes, as to what levels of exposure constitute criminal conduct.

by an independent industrial hygiene consulting firm retained by the prosecutors concluded that the Company was complying with OSHA standards relating to exposure to chemicals, the effects of which were the primary allegations in the indictments.

According to representatives of the Company, beginning in the late 1970s management had a difficult relationship with the Service Employees International Union AFL-CIO, Local 25, ("the Union"), which represented many of the Company's employees. The Union became critical about workplace safety and health issues as a way to maintain the employees' interest in union activities. The Union encouraged employees to file internal grievances regarding safety and health, workers' compensation claims, and complaints with OSHA.

In response, OSHA conducted extraordinarily close scrutiny of safety and health conditions at the Company's workplace. Between 1976 and 1983, the period covered by the indictments, OSHA conducted eight on-site inspections, some as little as three months apart. At least half of these inspections occurred in response to employee complaints. OSHA obtained and analyzed the employees' medical records. And OSHA wrote to the Company recommending, although not mandating, additional steps beyond compliance with the OSHA standards that the Company could take to improve its workplace.

It is noteworthy that not one of the inspections revealed violations of OSHA's permissible exposure limits ("PELs") for individual airborne contaminants.[4] OSHA

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[4] After the inspection of October 25, 1983, the Company was cited for exposing one employee to multiple airborne contaminants in violation of the "mixture rule," 29 C.F.R. § 1910.1000(d)(2)(i). The mixture rule purports to prohibit exposure to combinations of regulated chemicals above a level determined by the formula stated in the standard, even if the exposure to each individual chemical is below the PEL for that chemical. However, the rule is unenforceable because it omits a requirement of additivity

issued only a few citations for violation of other OSHA standards; in those cases the Company took timely abatement action. Four of the inspections resulted in no citations whatsoever, and none of the violations was considered willful.

Inspection of October 19, 1976.[5] OSHA cited the Company for two non-serious violations relating to the OSHA noise standard.

Inspections of March 1977 and June 3, 1977.[6] Neither the programmed inspection in March 1977 nor the inspection on June 3, 1977, which occurred in response to an employee complaint,[7] resulted in any citation. An OSHA report to the complaining employee about the June 1977 investigation describes the results of both inspections:

> During the inspection, it was determined that Chicago Magnet Wire Corporation does not have phenol (C_6H_5OH) in the plant and that the housekeeping was adequate. The odor . . . [deleted by OSHA] was most probably due to cresol, a compound used during manufacturing processes at Chicago Magnet Wire Corporation. However, three months ago Chicago Magnet Wire had a complete OSHA industrial hygiene inspection and was found to be in compliance with the OSHA Airborne Contaminant Standards as

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of health effects that was a key component of the consensus standard from which OSHA derived the formula. *Senco Products, Inc.*, 10 O.S.H. Cas. (BNA) 2091 (Rev. Comm'n Decision Oct. 29, 1982); *Duriron Company, Inc.*, 6 O.S.H. Cas. (BNA) 1701 (Rev. Comm'n Final Order June 2, 1978).

[5] OSHA Citation and Notification of Penalty No. S7275-012, Jan. 6, 1977.

[6] OSHA Safety and Health or Accident Inspection Report (hereinafter "OSHA Report") No. Q6677-026, June 6, 1977.

[7] OSHA conducts unannounced inspections of facilities on a regular basis ("programmed inspections") and also conducts inspections in response to employee complaints.

> well as housekeeping standards. The industrial hygienist for the company assured us that none of the manufacturing processes at Chicago Magnet Wire have changed within the past 3-4 years.[8]

Letter from Frank C. Memmott, OSHA Area Director, June 14, 1977.

Inspection of November 2, 1977 to March 10, 1978.[9] After this inspection, which was triggered by an employee complaint, OSHA cited the Company for not inspecting one respirator on a regular basis, for maintaining one respirator and air pack in poor working order, and for not having written procedures available for emergency respirator usage. In a March 14, 1978 letter to the complaining employee, OSHA Area Director Frank Memmott stated:

> Regarding your complaint, air samples were taken in the plant during the inspection to determine employee exposure to cresylic acid. The sample analysis results have been returned from our laboratory. All of the sample results were below the permissible OSHA exposure levels. At the time of the inspection, the ventilation system appeared to be adequate.

Following the citations, the Company promptly corrected its procedures for respirator inspection and usage.

Inspection of May 31, 1979.[10] In this inspection, again in response to an employee complaint, OSHA found no violations and issued no citations. In its response to the complaining employee, OSHA stated:

> Regarding your complaint, both of the conditions you expressed concern about have been evaluated

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[8] This, and other letters to complaining employees, reflected OSHA's policy of affording the employee the right to informal review of the conclusions from the inspection.

[9] OSHA Report No. W7066-075, June 9, 1978.

[10] OSHA Report No. S7275-102, June 7, 1979.

> during previous inspections and neither was found to be in apparent violation of the standards. Neither of these processes have changed since the other investigations; for these reasons, our office contemplates taking no further action on your complaint at this time.

Letter from Morley Brickman, OSHA Acting Area Director, June 8, 1979.

Inspection of March 23, 1982.[11] No citations were issued as a result of this programmed inspection.

Inspection of July 21, 1983 to August 8, 1983.[12] After this inspection, conducted in response to another employee complaint, OSHA cited the Company for several violations relating to the noise standard, the need for better procedures for dealing with spills and for storage of flammable liquids, the need for electrical improvements, the need for quick washing facilities, and failure to provide full access to medical records. The Company filed a notice of contest of the citations and subsequently entered a settlement agreement with OSHA. The Settlement Agreement, OSHRC Docket No. 83-1007 (Nov. 7, 1984), which was signed by OSHA, the Company, and the Union, recited that abatement action had been completed.

Inspection of October 25, 1983 to November 1, 1983.[13] Following this programmed inspection, OSHA issued citations for failure to provide individual respirators and, as discussed above, for the violation of the mixture rule. The Company also contested these citations and subsequently entered into a settlement agreement with OSHA.[14]

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[11] OSHA Report No. B4804-753, Mar. 23, 1982.

[12] OSHA Report No. H2156-199, Sept. 20, 1983.

[13] OSHA Report No. H2156-206, Dec. 2, 1983.

[14] As discussed at n.4, *supra*, the mixture rule is unenforceable. The Company decided to settle rather than contest this citation solely to avoid the costs of litigation.

The Settlement Agreement, OSHRC Docket Number 83-1292 (Dec. 14, 1984), again recites that the Company had completed abatement action. In a subsequent letter, OSHA acknowledged the Company's compliance with the individual PELs. OSHA further recommended, but did not mandate, installation of controls to mitigate any possible cumulative effect of exposure in areas where employees work 12-hour shifts; more extensive monitoring to determine if certain workers had become sensitized; and repiping of certain vents to the outside of the building. Letter from Josephine O'Brien, OSHA Area Director, to Tony Jordan, President, Chicago Magnet Wire Co., Dec. 23, 1983.

Following the October 1983 inspection, OSHA also commenced a special review of medical records of all employees who had been at the workplace at any time from January 1982 to December 1983.[15] The Company provided to OSHA its employee medical records, including the results of clinical laboratory tests and physical examinations conducted by Dr. William Buckingham, an eminent internist at Northwestern University. OSHA also reviewed all of the results of the examinations conducted by Dr. Mark Round, who had examined the employees at the behest of the Union. After conducting "an extensive review" of these data, OSHA concluded:

> Despite the extensive laboratory investigations [an apparent reference to the clinical testing conducted at Northwestern] the objective data do not support evidence of any specific workplace-related occupational disease.[16]

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[15] Letter of Thorne A. Auchter, Assistant Secretary of Labor for Occupational Safety and Health and Stanley C. Haimes, OSHA Medical Records Officer, to Chicago Magnet Wire Co., Dec. 6, 1983.

[16] Memorandum from Ralph Yodaiken, M.D., Director, OSHA Office of Occupational Medicine, to Frank Strasheim, OSHA Regional Administrator, April 2, 1984.

Thorough scrutiny by OSHA showed that the conditions at the Company's workplace did not present known hazards to employees. Nonetheless, in 1983, a disgruntled former employee swore out a criminal complaint against the five individual petitioners and the Company. Other employees joined in, going to then-Cook County State's Attorney Richard M. Daley ("Daley") to seek action on their complaints about the workplace conditions.

Daley commenced an investigation and convened a grand jury in February 1984.[17] During the course of the investigation, Daley arranged for an outside industrial hygiene firm to conduct monitoring in the Company's workplace. Based on the results of air sampling conducted on June 28, 1984, the firm concluded that "inhalation of solvent vapors does not constitute a major health hazard, since solvent exposure was below the OSHA Permissible Exposure Limit." Industrial Hygiene Survey Report, Chicago Magnet Wire Corporation, June 28,

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[17] The investigation and subsequent prosecution generated significant publicity. *See, e.g.*, "Officials probe unsafe-factory charges," *The Daily Herald*, Nov. 4, 1983; "Jury probes local factory," *The Daily Herald*, Feb. 28, 1984 (front page story); WMAQ-TV (NBC) 4:30 p.m. News, Sept. 25, 1984 (Daley shown giving statement at press conference); "Factory executives indicted; Elk Grove firm lied to workers about hazards: Daley," *The Daily Herald*, Sept. 26, 1984 (front page story); "Suburb firm's execs charged with exposing workers to gas," *Chicago Sun-Times*, Sept. 26, 1984 (Daley quoted regarding conditions at the plant); "Indicted firm has history of pollution problems," *Chicago Tribune*, Sept. 27, 1984 ("The indictments mark the second time in the last year that Cook County State's Atty. Richard Daley has sought criminal charges against a corporation for injuries to workers."); "Local man indicted in toxic chemical case," *Highland Park News*, Sept. 27, 1984 (Daley quoted); "Company officers indicted for worker injuries," *Business Insurance*, Oct. 1, 1984 (quoting Daley); WBBM-TV 6:00 p.m. News, Feb. 5, 1986 ("Cook County State's Attorney, Richard Daley, says one courtroom defeat will not stop him from prosecuting corporate officials for workplace hazards.").

1984.[18] The tables appended to the report show that the exposure levels for all chemicals studied were well below the PELs.

Daley submitted neither the extensive OSHA record nor the results of his own investigation to the grand jury. Nor did he present the testimony of Dr. Buckingham, who had concluded that there was no evidence of workplace-related illness or injury. The primary evidence before the grand jury was the testimony of current and former employees. The grand jury issued the initial indictments in September 1984 and superseding indictments in June 1985.

ARGUMENT

I. THE OSH ACT ESTABLISHES A DETAILED FEDERAL REGULATORY SCHEME FOR WORKPLACE SAFETY AND HEALTH THAT SHOULD NOT BE DISPLACED

The Illinois Supreme Court's decision squarely conflicts with the OSH Act's intent to establish a comprehensive federal scheme of occupational safety and health regulation, with a carefully delineated state role. The legislative history of the OSH Act, which has not been substantively amended in its almost twenty years, is replete with statements that Congress enacted the OSH Act because the states were not doing an adequate job of addressing safety and health aspects of working conditions.[19] The OSH Act includes detailed procedures to ensure that occupational safety and health regulations have a sound

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[18] The report notes the possibility of combined effects from different solvents or different routes of exposure. However, no analyses were performed to show whether there was a factual basis to support such a concern. *Id.* at 2.

[19] *See, e.g., Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong., 1st Sess. at 141, 144, 324, 413, 1033, 1049 (1971) (hereinafter "*Legis. History*").

scientific basis and are carefully enforced. Congress further established that states may assume jurisdiction over occupational safety and health issues only by following certain specific procedures. Illinois decided not to obtain such authority.

A. OSHA Standards Are To Be Based on the Best Available Scientific Evidence Respecting Health Effects and Feasibility

The regulatory scheme adopted by the OSH Act has two basic components: (1) requirements that would address occupational safety and health promptly after enactment of the OSH Act in 1970; and (2) detailed procedures for establishing, over the longer run, objective standards based on the best available scientific evidence respecting health effects and feasibility.

Congress began with the general duty clause, OSH Act Section 5(a)(1), 29 U.S.C. § 654(a)(1), which establishes a self-implementing requirement that every employer protect its employees from "recognized hazards" that "are causing or are likely to cause death or serious physical harm." By limiting applicability of the general duty clause, Congress expressed a preference for specific standards. Congress expected that over time the general duty clause would play a decreasing role as OSHA promulgated more standards which would provide more specific guidance to employers, and more comprehensive protection for employees. *See, e.g., Legis. History* at 1217.

Next, Congress authorized and directed OSHA to issue precise health and safety standards, in two steps. First, during the first two years of the effectiveness of the OSH Act, OSHA could adopt as OSHA regulations a variety of preexistent federal and private consensus standards. Section 6(a), 29 U.S.C. § 655(a).[20] OSHA adopted num-

[20] This extraordinary waiver from the notice and comment rulemaking requirements of the Administrative Procedure Act was designed to facilitate the prompt issuance of standards.

erous standards under this provision. 36 *Fed. Reg.* 10465-714 (May 29, 1971).

Congress further provided for normal notice and comment rulemaking to enable subsequent adoption of additional standards. Section 6(b), 29 U.S.C. § 655(b). Congress required OSHA to use particular care in developing standards. Section 6(b)(5) directs OSHA to use "the best available evidence," including "research, demonstrations, experiments, and such other information as may be appropriate"; "the latest available scientific data in the field"; and the "experience gained" by OSHA. 29 U.S.C. § 655(b)(5); *see also Legis. History* at 202 ("the development of occupational health and safety standards involves technical and complex problems requiring professional expertise and competence"). Congress further recognized that it would not be possible for employers to provide workplaces completely free of any hazard. Instead, Congress conditioned OSHA's standard-setting authority on economic and technological feasibility and limited OSHA's authority to regulation only of significant risks of material impairment to health. Section 6(b)(5), 29 U.S.C. § 655(b)(5); *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 508 (1981); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 642, 647-48 (1980).[21]

Congress established other federal entities to assist OSHA in these tasks. The National Institute of Occupa-

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[21] Congress also recognized employers' concerns by authorizing the Secretary to grant variances or exemptions from standards and providing for protection of employers' trade secrets. Sections 6(d), 16, 29 U.S.C. §§ 655(d), 664. On the other hand, Congress also gave OSHA extraordinary authority to establish emergency temporary standards, without notice and comment rulemaking, upon a determination that a "grave danger" is presented by exposure to toxic or physically harmful substances or by new hazards and that an emergency standard is necessary to protect employees from such danger. Section 6(c), 29 U.S.C. § 655(c).

tional Safety and Health ("NIOSH") researches occupational safety and health issues and conducts educational and information programs for the dual purposes of developing personnel qualified to carry out the purposes of the OSH Act and informing employers and employees of the importance and proper use of equipment. Sections 20-22, 29 U.S.C. §§ 669-71. Congress also established the National Advisory Committee on Occupational Safety and Health to advise OSHA and the Secretary of HHS on matters relating to workplace safety and health. The Committee meets at least twice yearly and is composed of twelve members representing management, labor, occupational safety and health professionals, and the public. Section 7(a), 29 U.S.C. § 656(a). In addition to this permanent body, OSHA may convene ad hoc advisory committees to assist in setting standards. Section 7(b), 29 U.S.C. § 656(b).

OSHA has used its Section 6(b) and 6(c) authority on many occasions. The OSHA rulemakings include substance-specific standards, such as those for vinyl chloride, lead, benzene, and cotton dust;[22] the generic Hazard Communication Standard,[23] which requires employers to assess hazards of every substance in the workplace, to

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[22] 29 C.F.R. §§ 1910.1017, 1910.1025, 1910.1028, 1910.1043. These substance-specific standards typically include exposure limits (frequently an eight-hour time-weighted average and a short-term or ceiling limit) and provisions regarding monitoring, medical surveillance, training, and labeling. These particular standards were the subject of protracted litigation, and reflect substantial judicial consideration. *American Textile Manufacturers Institute* v. *Donovan*, *supra* (cotton dust standard); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, *supra* (benzene standard); *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (lead standard); *Society of the Plastics Industry* v. *OSHA*, 509 F.2d 1301 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975) (vinyl chloride standard).

[23] 48 *Fed. Reg.* 53280 (Nov. 23, 1983), as amended 52 *Fed. Reg.* 31852 (Aug. 24, 1987).

provide relevant information and training to employees, and to provide relevant information to purchasers so they may appropriately train and educate their employees; and more recently, a comprehensive revision and expansion of the "Z Tables" at 29 C.F.R. § 1910.1000, which establish PELs for several hundred specific chemicals.[24]

B. The OSH Act Establishes Detailed Procedural Protections That Ensure Careful Enforcement of OSHA Standards

The OSH Act includes extensive and detailed enforcement provisions designed in part to ensure "fair and even" treatment of employers. *Legis. History* at 413. OSHA is authorized to enter and inspect and investigate workplaces and to question employers and employees at "reasonable times, and within reasonable limits and in a reasonable manner. . . ." Section 8(a), 29 U.S.C. § 657(a). Upon receipt of an employee complaint, OSHA is required to conduct a special inspection as soon as practicable, unless the Agency determines that there are not reasonable grounds to believe that a violation or danger exists. Section 8(f)(1), 29 U.S.C. § 657(f)(1).[25] Employer and employee representatives may accompany OSHA officials during the inspection. Section 8(e), 29 U.S.C. § 657(e). If a violation is observed, OSHA is required to issue, "with reasonable promptness," a written citation describing "with particularity the nature of the violation." The citation must be posted to enable review by employees. Section 9, 29 U.S.C. § 658.

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[24] 54 *Fed. Reg.* 2332 (Jan. 19, 1989).

[25] The OSH Act includes detailed provisions to protect the integrity of the inspection process. Any person giving advance notice of an OSHA inspection to an employer is subject to criminal penalties. Section 17(f), 29 U.S.C. § 666(f). Congress also provided for protection of employees against discrimination for asserting rights under the Act and empowered the Secretary of Labor to protect those rights. Section 11(c), 29 U.S.C. § 660(c).

Congress created a specialized expert tribunal, the Occupational Safety and Health Review Commission ("the Commission"), to adjudicate alleged violations of the general duty clause and OSHA standards. Section 12, 29 U.S.C. § 661. The Commission was established as an independent agency to provide due process to employers [26] —there was a general belief that employers would receive a greater assurance of even-handed treatment than they might within the Department of Labor, which had traditionally regarded employees as its constituency. The Commission is composed of independent administrative law judges, and three commissioners appointed by the President with the advice and consent of the Senate "from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission. . . ." Section 12(a), 29 U.S.C. § 661(a).

Employers may contest citations before an administrative law judge of the Commission, with appeal of the judge's decision to the Commissioners.[27] As a further safeguard for employers, the decisions of the Review Commission are subject to review in the Courts of Appeals. Section 11(a), 29 U.S.C. § 660(a).

The OSH Act establishes civil and criminal penalties for violation of OSHA standards. Serious violations are subject to civil penalties of up to $1,000; willful or repeated violations are subject to civil penalties of up to $10,000. A willful violation causing death of an employee is subject to a criminal penalty of up to six months imprisonment and a fine of up to $10,000. Section 17, 29 U.S.C. § 666.[28]

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[26] *Legis. History* at 392-93, 420, 1210.

[27] During the pendency of these proceedings, OSHA may seek injunctive relief to counteract imminent dangers. Section 13, 29 U.S.C. § 662.

[28] In the view of the Department of Justice and OSHA, the Comprehensive Crime Control Act of 1986 has increased the

In response to the preemption issue, prosecutors have asserted that the criminal penalties of the OSH Act are inadequate to properly punish employer misconduct. Such complaints should be addressed to Congress. Congress can at any time modify the penalties specified in the OSH Act, and it has considered proposals to do so.[29]

C. The OSH Act Carefully Delineates the Role of States in Addressing Workplace Safety and Health Issues

A primary purpose of the OSH Act was generally to establish uniform occupational safety and health standards. *Legis. History* at 141, 297, 413. Having adopted a comprehensive scheme to govern safety and health aspects of working conditions, Congress specifically provided for state jurisdiction in two narrowly-defined areas: (1) where there is no federal standard in effect respecting an occupational safety or health issue; and (2) where a state submitted and obtained federal approval of a plan for the development of state standards and their enforcement. Section 18(a), (b), 29 U.S.C. § 667(a), (b).

OSHA maintains close oversight over approval and administration of such plans. OSHA must scrutinize carefully any state plan in order to ensure that the plan meets each of the criteria of Section 18(c). 29 U.S.C. § 667(c).[30] Even after a state plan is approved, OSHA

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maximum fines in the event of an employee fatality to $250,000 for individual defendants and $500,000 for corporate defendants.

[29] *See* S. 490, 101st Cong., 1st Sess., 135 *Cong. Rec.* S1931-32 (daily ed. Mar. 1, 1989) (increased civil penalties); S. 2518, 100th Cong., 2d Sess., 134 *Cong. Rec.* S7886-89 (daily ed. Jun. 15, 1988) and H.R. 4856, 100th Cong., 2d Sess. (1988) (increased criminal penalties—including up to 20 years imprisonment—and extension of criminal penalties to situations where willful violation of a standard caused serious injury or illness or where the violation caused a substantial probability that death or serious physical harm could result).

[30] The eight Section 18(c) criteria include designation of an administrative agency, development of standards and an inspection

retains jurisdiction to enforce its own standards until OSHA determines, based on at least three years of experience, that the state's administration of the plan will in fact meet the criteria of Section 18(c). Section 18(e), 29 U.S.C. § 667(e). OSHA then must make a continuing evaluation and may withdraw approval at any time upon notice to the state. Section 18(f), 29 U.S.C. § 667(f).

About 25 states and territories have completed the state plan process and have obtained federal approval to regulate occupational safety and health issues. *See* 29 C.F.R. § 1952.1. States that create state plans pursuant to Section 18(b) can, and some do, provide more severe criminal penalties than those established by the OSH Act. Significantly, North Carolina's state plan expressly provides for the application of state general criminal laws for willful violations that result in a fatality. N.C. Gen. Stat. § 95-139. Illinois has not availed itself of the opportunity to develop and implement a state plan.[31]

D. State Criminal Prosecution Such As That Below Is Preempted by the OSH Act

As Section 18 makes clear, once OSHA has issued a standard governing working conditions, the OSH Act "expressly preempts *state law pertaining to issues that are addressed by OSHA standards* unless a state plan has been approved by the Secretary," even where state law imposes more stringent requirements than the federal standard in effect. *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 592 (3d Cir. 1985) (emphasis added); *see also New Jersey State Chamber*

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and enforcement mechanism "at least as effective" as that of OSHA, application of more stringent state standards only if "required by compelling local conditions" and "not unduly burden[some on] interstate commerce," and regular reporting to OSHA on administration of the plan.

[31] In fact, Illinois filed an application for state plan approval in November 1973, but withdrew the application in June 1975.

of Commerce v. *New Jersey*, 653 F. Supp. 1453, 1461, 1464 (D.N.J. 1987) ("Section 18(a) . . . provides that a state has jurisdiction over an occupational safety and health issue only if there is no federal standard in effect"). OSHA regulations confirm the broad scope of preemption. OSHA interprets Section 18 as "preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which a Federal standard has been issued under section 6 of the Act." 29 C.F.R. § 1901.2.

The conflict between the decision below and the OSH Act is underscored by the fact that the principal allegations of the indictment involve exposure to airborne contaminants for which OSHA has established PELs, having made a judgment that such levels would be protective and can feasibly be attained. Absent preemption of such state prosecutions, individual prosecutors could determine after the fact what an employer should have done, without regard to the scientific data respecting significance of risk, without consideration of economic or technological feasibility, and without the protections for employers of the OSHA standard-setting process and adjudication of alleged violations by an expert review commission. This result would utterly frustrate the OSH Act procedures for development and enforcement of federal regulations and for close federal oversight over state regulatory efforts. Illinois should not be permitted to evade the statutory scheme, with its built-in protection for both industry and employees, by seeking, in effect, to regulate through arbitrary and ad hoc criminal prosecutions.

II. CRIMINAL PROSECUTIONS BASED ON GENERAL STATE CRIMINAL LAWS WOULD REINTRODUCE THE CONFUSION CONGRESS INTENDED TO AVOID AND WOULD UNDULY BURDEN INDUSTRY

Application of vaguely defined state criminal statutes to guide, indeed control, employer conduct respecting working conditions would produce changes of potentially immense economic significance. OSHA standards establish objective criteria which are set to provide protection, generally with a considerable margin of safety, against significant adverse health or safety risks. It is not uncommon, however, for a small percentage of workers in any workplace to be able to detect odors that may be offensive or otherwise to experience minor irritation due to exposure to chemicals at levels below the PELs. And from time to time, individual idiopathic reactions occur.

If employers must, upon pain of fine and imprisonment, provide working conditions in which no one will detect odors, experience minor irritation, or experience a hypersensitive reaction, the unlimited and strict liability which Congress decided not to impose when enacting the OSH Act will in essence be the governing law. That law would be established on a subjective and ad hoc basis by prosecutors and the complaining testimony of individual employees. This would completely upset the balance struck by Congress—that occupational standards are to establish objective criteria based on the best scientific evidence as to health effects and technological and economic feasibility, so as to provide precise notice to employers of the applicable requirements. Congress explicitly concluded that standards should "be expressed in terms of objective criteria," and that a vague common-law duty should not "be a general substitute for reliance on standards." *Legis. History* at 147, 150.

The expense of providing a workplace that would avoid a criminal prosecution such as that commenced below would far outstrip the expense of compliance with OSHA

standards. Moreover, ad hoc criminal prosecutions provide neither the notice nor consistency needed for rational business decisions. These potentially limitless added costs, along with the need for employers to try to make business decisions based on their predictions of what conduct could be subject to criminal prosecutions, could lead to major dislocations. Employers might feel compelled to move their operations to another state or even outside of the United States to protect their companies and supervisory employees from criminal prosecution. Further, these expenses could place American industry at a substantial competitive disadvantage in international trade. The effects of subjective and non-uniform standard-setting were the very basis for enactment of the OSH Act.

CONCLUSION

If allowed to stand, the decision of the Illinois Supreme Court would frustrate the congressional intent underlying the OSH Act. It would enable states to displace federal law completely without complying with the state plan provisions of Section 18 of the OSH Act. And it would result in additional prosecutions based on vague and unknowable criteria, rather than the carefully-developed standards issued under the OSH Act. For these reasons, SOCMA urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK ASTA, *et al.*,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

No. 88-1783

BRIEF OF AMICUS CURIAE ILLINOIS STATE CHAMBER OF COMMERCE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK ASTA, *et al.*,

Petitioners,

v.

STATE OF ILLINOIS,

Respondent.

No. 88-1783

BRIEF OF AMICUS CURIAE ILLINOIS STATE CHAMBER OF COMMERCE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

I.

INTEREST OF AMICUS

The Illinois State Chamber of Commerce, as the state's largest business organization, is made up of more than 5,800 business firms. The member companies come in all shapes and sizes, from every business sector, and from all parts of the State. The ruling of the Illinois Supreme Court here that Illinois has criminal jurisdiction over employment safety on matters already controlled by federal law through the Occupational Safety and Health Act, directly affects its membership. Consequently, the members of the Illinois State Chamber of Commerce are directly affected by an enormous personal liability now imposed by the State of Illinois.

Because of the significant statutory issues presented by this case, their nationwide impact, and the Illinois State

Chamber of Commerce's obligation to represent the interests of Illinois employers at stake here, it is necessary for the Illinois Chamber of Commerce to participate as *amicus curiae.*

Amicus curiae received consent to file this brief from counsel for both the petitioners and the respondent. Copies have been provided to the Clerk.

The accompanying argument urges this Court to grant the petition of Frank Asta, et al., and reverse the judgment of the Supreme Court of Illinois.

II.

ISSUE PRESENTED

Whether the Supreme Court of Illinois correctly found that its local prosecutors and grand juries have jurisdiction to prosecute employers under criminal laws for violation of worksite safety practices that otherwise conform with health and safety standards promulgated under the Occupational Safety and Health Act.

III.

SUMMARY OF ARGUMENT AND WHY THE WRIT SHOULD BE GRANTED

The Illinois State Chamber of Commerce is deeply concerned that the decision of the Supreme Court of Illinois in this case, *Illinois v. Chicago Magnet Wire Corp.*, 126 Ill.2d 356, 534 N.E.2d 962 (1989), allowing local juries and prosecutors to inquire into the merits of workplace health and safety practices in areas otherwise covered by federal standards developed from scientific and technical inquiry, will deter the voluntary and uniform application of federal standards. The impact on the administration of the Act will be undercut and threatened if the State is able to administer a criminal program of its own that will inevitably lead to uneven results and unpredictable conclusions among the fifty states.

If state criminal prosecutions are permitted, the effectiveness of OSHA's important investigation, prevention, and settlement provisions will be dramatically undercut. Following a workplace accident, well-advised employers would have to advise management personnel, including officers and front-line supervisors, that they should always assert their First Amendment right against self-incrimination because a state criminal indictment is possible. Accordingly, OSHA investigations would be thwarted and settlement made impossible. These practices would not be available if state criminal prosecutions are disallowed.

Normal principles of federal preemption established by this Court in cases of state regulatory attempts of activity covered under the National Labor Relations Act, as within the preemptive jurisdiction of the National Labor Relations Board, clearly demand the preemption of state criminal regulation of workplace safety when such similar acts also fall within the jurisdiction of the Occupational Safety and Health Administration ("OSHA"). Because of the growing state developments on point and the uncertain guidance given to the nation's employers by the underlying decision, this Court should grant the writ of certiorari in this case in order to clarify the law and stem further erosion of OSHA's jurisdiction by state courts.

IV.

ARGUMENT

A. THE CONGRESS EXPRESSLY INTENDED FOR THE OSH ACT TO PREEMPT ALL STATE REGULATION OF WORKPLACE SAFETY UNLESS IT RECEIVED APPROVAL TO DO SO FROM THE U.S. SECRETARY OF LABOR

Until the decision of the Illinois Supreme Court in the instant case, it had become well settled that states lost both civil and criminal jurisdiction to prosecute employer's for alleged violation of workplace safety standards. *See Sabine*

Consol., Inc. v. Texas, 756 S.W.2d 865 (Ct. App. 1988); *Michigan v. Hegedus*, 169 Mich.App. 62, 425 N.W.2d 729 (1988). *Contra Wisconsin v. Black*, 144 Wis.2d, 745, 425 N.W.2d 21 (1988). The court below lost sight of the fact that the Congress in its very statement of purposes has demonstrated that the Occupational Safety and Health Act, was specifically intended to preempt state regulation where the federal government has already set a uniform standard.

Hence, section 2(b) of the OSH Act, 29 U.S.C. § 651(b), declares,

> it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.

The Congressional Findings and Purpose asserts that this will be accomplished through methods of encouragement, 29 U.S.C. § 621(b)(1), "by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions, 29 U.S.C. § 621(b)(2), by authorizing the setting of "mandatory occupational safety and health standards" and creation of a Commission to carry "out adjudicatory functions under the Act," 29 U.S.C. § 621(b)(3), by providing research to develop "innovative methods, techniques, and approaches for dealing with occupational safety and health problems," 29 U.S.C. § 621(b)(5), "by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions," 29 U.S.C. § 621(b)(6), "by providing medical criteria which will assure" the health of workers, 29 U.S.C. § 621(b)(7), "by providing for the development and promulgation of occupational safety and health standards," 29 U.S.C. § 621(b)(9), "by providing an effective enforcement program," 29 U.S.C. § 621(b)(10), etc.

On the face of the statute itself, therefore, is the congressional directive that nationwide standards be developed, a scientific and psychological approach for dealing with occupational safety and health installed, medical criteria utilized "to assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience," 29 U.S.C. § 621(b)(7), and "an effective enforcement program." 29 U.S.C. § 621(b)(10).

The County of Cook attempted to prosecute the petitioners for aggravated battery, reckless conduct and conspiracy under state law for having provided an unsafe workplace. The Petitioner, correctly, highlights the prosecutor's, use of the phrase "poisonous and stupifying substances" to reflect the criminal object of exposing workers to the substances which the County deems wrongful. The text of the indictment best illustrates the subject matter contemplated to be regulated by the State:

Aggravated Battery:

> "while having a duty to provide Danny Vaughn a safe workplace, knowingly, while engaged in the business of coating wire with enamel, polyvinyl chloride, and other substances authorized, commanded and committed acts of commission and acts of omission with the awareness that a substantial probability existed which would cause Danny Vaughn to take by deception, for other than medical purposes, poisonous and stupifying substances, to wit: substances including but not limited to, trichloroethylene, xylene, cresol, phenol, n-methyl-2-pyrrolidon, 4-methyl-2-pentanone, ketone, urethane, polyvinyl chloride, toluene diisocyanate, aluminum dust, copper dust, and naptha, and such acts caused harm to Danny Vaughn in that: contrary to the Stature, and against the peace and dignity of the same People of the State of Illinois."

Indictment of Chicago Magnet Wire Corp., December 4, 1984 (emphasis added).[1]

The remaining acts leading to the subsequent counts of individual liability against petitioners, such as for aggravated battery, include the failure of petitioners to provide employees protection, "necessary safety instructions and necessary safety equipment and sundry health monitoring systems" for the substances that "can be taken into the body by inhalation and skin absorption." Count 2.[2] That the substances were stored in an adverse manner causing "harmful exposure to them by both inhalation and skin absorption." Count 3. That the "defendants provided inadequate ventilation." Count 4. Finally, the State complains the "defendants maintained dangerously overheated working conditions . . . while working with . . . poisonous and stupifying substances." Count 5.

While reading like an OSHA citation, for failure to procure and provide an employee with safety devices, the conspiracy counts also allege a violation of Ill. Rev. Stat. 1983, Ch. 38, Sec. 8-4, for undertaking an allegedly criminal act to increase ventilation of the plant "[d]uring an Occupa-

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[1]Each of the following enumerated substances has been issued a standard by OSHA. *See* OSHA TABLE E-1-A. Furthermore, the substances have been evaluated By the National Institute for Occupational Safety and Health (NIOSH) pursuant to the OSH Act and assigned protective exposure levels. The NIOSH Registry of Toxic Effects of Chemical Substances (RTECS) number for these substances are as follows: trichloroethylene (KX45500000), xylene (ZE2100000), cresol (GO5950000), phenol (SJ3325000), 4-methyl-2pentanone (SA7875000), ketone (MJ5075000), toluene diisocyanate (CZ6300000), aluminum dust *(see* OSHA standard), copper dust (GL5325000), and naptha (GF8635000).

[2]This count appears to make it criminal for the petitioners to have not communicated the chemical hazards of the materials in use at the plant. To the extent it does do so, it is preempted. OSHA's Hazardous Communication regulation, 29 C.F.R. § 1910.1200(a)(2): expressly provides that

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject.

Federal regulations under OSHA will preempt state law. *Ohio Mfrs. Assn. v. Akron*, 801 F.2d 824, 831, 834 (6th Cir. 1986); *United Steelworkers v. Auchter*, 763 F.2d 728, 733 (3d Cir. 1985); *Environmental Encapsulating Corp. v. New York*, 666 F. Supp. 535 (E.D.N.Y. 1987).

tional Safety and Health Administration air sampling survey... on July 21, 1983."

The fact that the State of Illinois has developed no plan of its own under the OSH Act, when the Congress has otherwise authorized the state to exercise jurisdiction over workplace safety by submitting a plan for development and enforcement of workplace standards, further evidences the preemptive intent of the Act. Sections 18(a) and (b) provide that:

> (a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this Title.
>
> (b) Any State, which at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under Section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

Rather than following this authorized procedure that may allow for more strict state criminal sanctions for occupational accidents, the State of Illinois proceeds as if these two sections of the OSH Act did not exist. *See People v. Hegedus*, 169 Mich. App. 62, 425 N.W.2d 729, 731 (1988) (explaining that the state under an approved plan may implement "criminal penalties in excess of OSHA").

Contrary to the Supreme Court of Illinois's resolution of the preemptive effect of the federal statute here, the analysis incorrectly assesses the comprehensive nature of the federal statute. Specifically, the court recognized that, "although the provisions of OSHA are comprehensive," 126 Ill.2d at 367,it concluded that the invitation of the States to establish their own plan "demonstrates that it did not intend to preclude supplementary State regulation." Thus, the court also con-

cluded that "there is nothing in OSHA or its legislative history to indicate that Congress intended to preempt the enforcement of State criminal law simply because of its incidental regulatory effect." 126 Ill.2d at 366. Section 18(a) is to the contrary.

First, Congress invited a plan from the State. Illinois has refused to enact such a conforming legislative plan. Second, it is precisely the "incidental" effect on OSHA standards that requires preemption of Illinois criminal law. Congress' invitation to the States to directly participate if it "desire[d] to assume responsibility for *development* and *enforcement* of occupational safety and health standards," is clear on the face of the statutory language. (emphasis added). Rather than undertaking the development of uniform standards based on scientific fact, and assuming the concomitant financial burden *(see* 29 U.S.C. § 667(c)(5)), state juries will be able to set ("develop") standards in their home states through precedent and imagination of danger. One could easily comprehend a jury setting a criminal standard of workplace conduct involving AIDS or other incapacitating disease based upon its impression of the danger of contamination. Countenancing or branding employer activity in this manner might also contravene the protections given such persons under federal health or anti-discrimination laws, such as the Rehabilitation Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S. § 794, or Title VII, 42 U.S.C. § 2000e. Local attitudes, cannot be allowed to interfere with the object of the carefully interwoven federal plan in this manner.

In *Brown v. Hotel & Restaurant Workers,* 468 U.S. 491, 104 S. Ct. 3179 (1984), this Court addressed the statutory scheme to regulate New Jersey casino unions despite the existence of the National Labor Relations Act's coverage of these unions. The Court in *Brown* explained that,

> Even in the absence of such express language or implied congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law. Such actual conflict between state and federal law

> exists when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217, 10 L. Ed. 2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404 L.Ed. 581 (1941).

104 S. Ct. at 3186.

In deciding that New Jersey's regulation of employee conduct in the casino industry was not preempted, the Court affirmed the usual evidentiary model that where conduct is "arguably" covered by federal law, there is a presumption of preemption. There, New Jersey's interest in preventing "crime, corruption and racketeering" were found not inconsistent with the Labor Management and Reporting and Disclosure Act's requirements of Congress and the Congress' approval of a compact by New Jersey with New York State in the matter showed the absence of a specific intent that "qualifications of casino industry officials does not actually conflict with § 7 and so is not preempted by the NLRA." *Id.* at 3190.

The burden of Illinois, similarly, is to disprove preemption, rather than defend a presumption that the federal statute is not preempted. In the instant case, the existence of sections 18(a) and (b) show that Congress "has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject." *Brown,* 104 S. Ct. 3185-86.

The Illinois Supreme Court also contends that although the "penal law may effect a regulation of behavior as OSHA safety standards do, regulation through deterrence, however, is not the sole purpose of criminal law." However, that method of regulation, does directly affect an employer's ability to comply with fairly developed OSHA standards when the pattern of prosecutorial discretion is not uniformly followed by the state and cannot be compelled. Under an

announced inspection and enforcement procedure set forth in an approved plan, which the imposition of an approved State plan would clearly afford, the standards of conduct and safety could be plainly followed, rather than arguably discerned by employers from jury verdicts.[3]

Clearly, the "incidental" effect of state criminal jurisdiction in fact will establish new standards and duties for employers. The cumulative effect of such litigation in the fifty states will blossom into a variety of standards and different results. Uniformity was Congress' goal. *Legislative History of the Occupational Safety and Health Act*, 144, 413, 444 (1971). Congress could not have contemplated its action could return the law in states without plans, to vagaries of general criminal law or haphazard enforcement activities; precisely the object of congressional contempt which the OSH Act was enacted to reverse. *See Wisconsin Dep't of Industry v. Gould, Inc.*, 106 S.Ct. 1057, 1062 (1986) ("Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the 'integrated scheme of regulation' created by Congress"). The lower courts are virtually unanimous in declaring that local and state regulation of employer conduct in areas covered by OSHA are preempted:

1. Hazard Disclosure Laws: In *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985), the court invalidated the hazard communication laws of the states of New York, Illinois, and New Jersey; *Manufacturers Ass'n. of*

[3] The Court should also be aware that the Occupational Safety and Health Review Commission has the power to preclude state review of evidence and activities investigated by OSHA. In *Monsanto Company*, OSHRC Docket No. 86-391 (Dec. 4, 1987), the Commission entered a settlement order and stipulation precluding use of "any documents gathered or prepared in connection with this matter shall be offered, disclosed, used or admitted in evidence in any other proceeding or litigation, whether state or federal, or whether civil, criminal or administrative, except for subsequent proceedings pursuant to the Occupational Safety and Health Act." Unless the federal agency's declaration of the scope of its jurisdiction is a nullity, the Act must contemplate the preclusion of state jurisdiction in certain cases deemed appropriate by the Commission. Consequently, there must exist exclusive federal power over workplace health and safety and the preclusion of state criminal laws, unless a state plan has been approved.

Tri-County v. Knepper, 801 F.2d 130 (3d Cir. 1986) (finding Pennsylvania's informational statute preempted; *Ohio Mfrs.' Ass'n v. Akron*, 801 F.2d 824 (6th Cir. 1986) (ordinance regulating hazardous and toxic substances preempted).

2. Hazardous Substances Posting: In *Manufacturers Ass'n. of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986), the court also found that Pennsylvania's statute requiring the posting and listing of hazardous substances found in the workplace was preempted.

3. State Workplace Survey Laws. In *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), the court invalidated a provision of New Jersey law requiring the disclosure to the public of certain hazardous substances in the manufacturing sector.

4. Labeling of Containers. State laws requiring employer's to label containers with hazardous substances were held preempted in the following cases: *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (New Jersey statute required labels with chemical names and Chemical Abstracts Service number); *Manufacturers Ass'n. of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986) (Pennsylvania statute requiring labels on containers and pipelines); *Ohio Mfrs.' Ass'n v. Akron*, 801 F.2d 824 (6th Cir. 1986) (ordinance requiring labeling, tagging, or marking container with chemical name, cancer warning, and reproductive warning).

5. Duty of Employers to Communicate with Employees: In *Manufacturers Ass'n. of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986), the court held that Pennsylvania's requirement that employers supply employees with the contents of material safety data sheets prepared by the state was preempted. *Also Environmental Encapsulating Corp. v. New York*, 855 F.2d 48, 54 (2d Cir. 1988); *Ohio Mfrs.' Ass'n v. Akron*, 801 F.2d 824 (6th Cir. 1986) (same).

6. Employee Training Programs: Laws requiring that employers initiate and maintain programs to inform their workers on workplace hazards were preempted by the OSH Act. *See Manufacturers Ass'n. of Tri-County v. Knepper*, 801

F.2d 130 (3d Cir. 1986); *Ohio Mfrs.' Ass'n v. Akron*, 801 F.2d 824 (6th Cir. 1986).

It has also been settled in Illinois that the state could not adopt safety and health standards where no plan had been submitted to the Secretary of Labor for approval. In *Stanislawski v. Industrial Comm.*, 99 Ill. 2d 36, 457 N.E.2d 399 (Ct. App. 1983), a case involving a claim for additional damages for the death of an employee in cases of wilful violation of such standards, the Illinois court held that an Illinois statute which adopted all rules or standards promulgated by the U.S. Secretary of Labor as its own was preempted by OSHA. The court found that § 667(b) of the OSH Act required the approval of a state plan for the development of standards and their enforcement. Without such a plan, there was no state standard in force and additional compensation could not be granted.

B. STATE CRIMINAL PROSECUTIONS WILL IMPAIR THE ABILITY OF OSHA TO INVESTIGATE WORKPLACE ACCIDENTS AND WILL HARM THE ABILITY OF THE AGENCY TO ENSURE WORKPLACE SAFETY AND HEALTH FOR ALL WORKERS

It is the position of amicus curiae that the Congress never intended for States to regulate as crimes those activities regulated by standards established by OSHA. Even as a matter of federal policy, OSHA would not have the authority to permit more severe criminal penalties on employer's than those imposed by the OSH Act itself, for to do so would undermine the ability of OSHA to prevent future accidents because of the interposition of the Fifth Amendment's active safeguards against compulsory process in criminal prosecutions. Consequently, the policy gleaned from the caselaw and review of the OSH Act itself, demonstrates that state jurisdiction of workplace health and safety matters are preempted.

In *Allis-Chalmers Corp.*, 20 O.S.A.H.R.C. 546, 3 O.S.H.C. (BNA) 1629 (1975), the Commission held that "the Occupational Safety and Health Act and the standards must

be construed strictly, not loosely." Even though it is not denominated a criminal statute under the U.S. Code, the Occupational Safety and Health Act's purpose and effect is to punish an employer. For that reason the Act and the regulations must be construed like a criminal statute and appropriate protections given to respondents. *Schild v. Busch*, 293 F. Supp. 1353, 1355 (1968) (holding marketing penalties under the Agricultural Adjustment Act, 7 U.S.C. §§ 1281-1393, construed strictly "as if they were criminal statutes").

Illinois has also refused to demonstrate that even if an employer complied with an OSH standard, the State and its prosecutors, would preclude use of their discretionary exercise of criminal jurisdiction. All the Illinois Supreme Court could suggest was that "in practical terms... it is unlikely that the state would bring a prosecutive action." 126 Ill.2d at 373.

Yet, in the instant case, the "poisonous and stupifying" substances complained of by the State are precisely those regulated by OSHA. *See* note 1, *supra*. The reality, then, is that Illinois either believes that OSHA standards are insufficient protective standards, irrelevant to intent, or that the OSH Act's enforcement mechanism to determine the violation of those standards is insufficient. Either way, the need for Congress to have intended preemption of state prerogatives represented in this matter is clear.

Illinois also espouses an interest in invoking "historic police powers" and suggesting that the "power to prosecute criminal conduct" and "[t]he regulation of health and safety has also been considered as 'primarily, and historically' a matter of local concern." 126 Ill.2d at 367. Again, the State has failed to demonstrate that it has ever exercised such jurisdiction before or that it in fact has a body of law that can be gainsaid to regulate the storage and use of industrial chemicals, specifically made the subject of the indictment. Rather, the State wishes to adopt an independent and unapproved statutory plan that complements the OSH Act:

> Thus, the criminal charges here do not set any new or other standards for workplace safety but rather

> seek to impose an *additional sanction* for an employer's conduct that, if proved, would certainly violate the duty set out in section 654(a) of OSHA (29 U.S.C. § 654(a) (1982)).
>
> 126 Ill.2d at 366.
>
> State criminal law can provide a valuable and *forceful supplement* to insure that workers are more adequately protected and that particularly egregious conduct receives appropriate punishment.
>
> 126 Ill.2d at 373.

This finding that "Congress . . . did not intend to preclude supplemental State regulation," 126 Ill.2d at 367, cannot withstand scrutiny, just as Wisconsin's contract debarment program was found tantamount as "supplemental" regulation of federally prescribed conduct and therefore preempted by the NLRA. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 106 S. Ct. 1057, 1062 (1986). *Also Five Migrant Farmworkers v. Hoffman*, 136 N.J. Super. 242, 345 A.2d 378 (N.J. 1975) (state law with respect to general working conditions preempted by the OSH Act). In *Gould*, 106 S. Ct. at 1061, the Court settled the circumstances where a State could affect a comprehensive federal regulatory plan:

> Because "conflict is imminent" whenever "two remedies are brought to bear on the same activity," *Garner v. Teamsters*, 346 U.S. 485, 498-499, 74 S.Ct. 161, 170, 98 L.Ed. 228 (1953), the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, *but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.* The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," *id.*, at 243, 79 S.Ct., at 778, and this Court has recognized that *"[c]onflict in technique can be fully as disruptive to the system Congress erected as*

> *conflict in overt policy." Motor Coach Employees v. Lockridge,* 403 U.S. 274, 287, 91 S.Ct. 1909, 1918, 29 L.Ed.2d 473 (1971). (Emphasis Added).

Illinois is clearly attempting to expand its jurisdiction to coverage already established by the federal scheme. The possibilities for interference by *ad hoc* application of criminal law to OSHA covered activities are endless. In a hypothetical case where a death has occurred at a jobsite, OSHA criminal jurisdiction would clearly apply. Under Illinois' view, there would be a rush to the courthouse by state prosecutors to determine criminal liability and to gather evidence. The Fifth Amendment right of the defendant employer, rather than investigation of the accident to determine its cause and whether it could have been avoided, would immediately become the matter in controversy. This would impair any subsequent OSHA investigation, an opportunity for OSHA to determine what occurred, and whether the circumstance might be prevented in the future. In the latter event, immediate alert notices could be released to the nation's employers. "The object of these provisions is prevention of injury or death." *United States V. Dye Constr Co.,* 510 F.2d 78, 82 (10th Cir. 1975); *Western Waterproofing Co.,* 1975 O.S.H.D. (CCH) ¶ 19,925 (1975).

There also would be a great reluctance by an employer-defendant to abate the problem, correct and resolve it during the pendency of state criminal proceedings. Even an approved state OSHA plan has not been interpreted as intending to "create a police agency over California business, it was intended to provide a healthful environment." *Salwasser Mfg. Co. v. Municipal Court,* 94 Cal. App.3d 223, 156 Cal. Rptr. 3d 292 (1979). Finally, the state's indictment would preempt OSHA's own criminal prosecution, for OSHA withholds the issuance of a citation until a decision is made by the Justice Department whether or not to prosecute the matter criminally. *Cedar Constr, Co.,* 5 O.S.H.C. 1311 (1977).

Here, the State of Illinois is attempting to regulate substance use through its criminal process without demonstrating

that the use of the aforementioned "poisonous and stupifying" chemicals exceeds federal standards in the workplace, thereby attempting to establish its own acceptable level of use within its jurisdiction.[4]

Finally, the State relies upon acts taken during an OSHA enforcement inspection of Chicago Magnet Wire Corp., to establish an element of criminal conspiracy from acts which, if true, would be clearly covered by OSHA for remedy and rectification. The State, however, has taken it upon itself to find such an act to be illegal against the federal agency, if true, and regardless of whether such acts were lawful or required to be taken. This is beyond the jurisdiction of the State in all known process under law.[5]

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[4] Under section 4(b)(4), 29 U.S.C. § 635(b)(4), the OSH Act expressly reserves to the states jurisdiction "with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." Illinois has not demonstrated that the criminal statutes it is employing against the petitioners, arose from statute or law of a specific nature in these three areas. Illinois, however, attempts to use a statute of general jurisdiction that is not "employment" specific to seek retribution. A state workmen's compensation statute is such a specific law that affects "employment" alone and is therefore not preempted by OSHA.

[5] This may also create an express conflict with a decision of the Secretary of Labor when authorizing a variance to an employer from the standards under § 6(d) of the OSH Act: "The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." Sec. 6(f), 29 U.S.C. § 655(f). The strain between the health and safety laws if federally authorized variances could be disregarded by state prosecutors would be self-evident.

V.

CONCLUSION

For the reasons stated above, amicus curiae Illinois State Chamber of Commerce, submits that the Court should issue the writ of certiorari to review the decision below and then reverse the decision of the Supreme Court of Illinois.

Respectfully submitted,

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